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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1395.

EX PARTE: IN THE MATTER OF SIMEON COY AND WILLIAM F. A. BERNHAMER, PETITIONERS, APPELLANTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED MARCH 24, 1888.

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Supreme Court of the United States.

APPEAL FROM CIRCUIT COURT FOR INDIANA.

Pleas of the Circuit Court of the United States for the District of Indiana, begun and holden at the United States Court House, in the City of Indianapolis, in said District, on the first Tuesday in November, in the year of our Lord one thousand eight hundred and eighty-seven, before the Honorable Walter Q. Gresham, Judge of said Court for said District.

EX PARTE SIMEON COY AND WILLIAM F. A. BERNHAMER.	8409. *Habeas Corpus.*

Be it remembered, that heretofore, to-wit: at the November term of said Court, on the 29th day of February, 1888, before the Honorable Walter Q. Gresham, Judge as aforesaid, the following proceedings in the above entitled cause were had, to-wit:

Come now in open Court, on the 29th day of February, 1888, the said petitioners, Simeon Coy and William F. A. Bernhamer, by their counsel, Charles L. Holstein and McNutt & McNutt, and present to the Court their petition for a writ of *habeas corpus*, in the words and figures following, to-wit:

To the Honorable Walter Q. Gresham, Judge of the United States Circuit Court, for the District of Indiana,

Your petitioners, Simeon Coy and William F. A. Bernhamer, respectfully show to your Honorable Court that they are and each of them is restrained of his liberty and detained in the custody of Edward Hawkins, the Marshal of the United States for the District of Indiana, and Isaac King, Sheriff of Marion County, in the State

of Indiana, and ex-officio keeper of the common jail of said county; that said Marshal and Sheriff hold your petitioners and each of them under the claim and authority hereinafter set forth, and under no other claim or authority whatever.

That on the 18th day of October, A. D. 1887, the Grand Jury of the United States for the District Court in and for the District of Indiana, returned into said Court an indictment against your petitioners and others therein named, wherein your petitioners and said others were sought to be charged with conspiring together to commit an offense against the United States, and your petitioners for greater certainty as to the contents of said indictment attach hereto and make by reference thereto a part of this petition a certified copy of said indictment; that upon the return of said indictment a writ or warrant was issued by the Clerk of said District Court to said Marshal, by authority of which writ or warrant your petitioners were by said Marshal arrested; whereupon they gave bond for their appearance to answer to said indictment.

That afterwards such proceedings were had in said Court as that said cause came on for trial on the 16th day of January, 1888; that on said day your petitioners appeared in said Court and moved the Court to quash said indictment, which motion the Court overruled, to which ruling of the Court, your petitioners at the time excepted; that thereupon they pleaded to said indictment "not guilty," whereupon the said cause was submitted to a jury elected, impaneled and sworn to try the same, which jury on the 28th day of January, 1888, returned into Court a verdict of guilty against each of your petitioners.

That afterwards, to-wit: on the 2d day of February, 1888, your petitioners moved said Court for a new trial of said cause and filed their reasons in support thereof, which motion the said Court overruled, to which ruling of the Court the defendants and each of them

at the time excepted; and thereupon your petitioners and each of them moved the Court in arrest of judgment, which motion was by said Court overruled, to which ruling of the Court your petitioners at the time excepted; and thereupon the Judge of said Court rendered against your petitioners a judgment on said verdict, as follows:

That the said William F. A. Bernhamer make his fine to the United States in the sum of one thousand dollars and that he be imprisoned in the State Prison North (of said State) for the period of one year; and that the said Simeon Coy make his fine to the United States in the sum of one hundred dollars, and that he be imprisoned in the said State Prison for the period of eighteen months, and committed your petitioners into the custody of said Marshal to be by him conveyed to said State Prison North, and into the custody of the Warden of said Prison, and that your petitioners are now in the custody of said Marshal and said Sheriff and by them illegally restrained of their liberty in said District under and by virtue of said order commitment and judgment of said Court and by no other claim of right or authority.

And your petitioners aver that said indictment, a copy of which is attached hereto as aforesaid, charges no offense against the United States, and that the United States District Court and the said Grand Jury thereof had no jurisdiction in the premises, and that the act of the said Grand Jury in returning said indictment, and of said District Court, and of said Marshal thereunder, and of said Marshal and said Sheriff in taking the said petitioners into custody and restraining them of their liberty under and by virtue of said judgment, order and commitment of said Court are wholly void; and the imprisonment of your petitioners and each of them is unlawful.

Your petitioners therefore pray that a writ of *habeas corpus* may be issued directed to said Marshal and said Sheriff requiring them

and each of them to produce the bodies of your petitioners and the body of each of them, and make return before this Court to said writ at a time and place to be fixed by your Honor, and upon said return and hearing of the same your petitioners pray that they and each of them may be released and discharged from said unlawful restraint and imprisonment.

SIMEON COY.
WILLIAM F. A. BERNHAMER.

STATE OF INDIANA, }
MARION COUNTY, } ss:

Before me, the undersigned, Clerk of the United States Circuit Court in and for the District of Indiana, on the 11th day of February, 1888, personally came Simeon Coy and William F. A. Bernhamer, whose names are subscribed to the foregoing petition, who being each first duly sworn, upon his oath says that the matters and things therein contained are true.

SIMEON COY.
WILLIAM F. A. BERNHAMER.

Subscribed and sworn to before me, this 11th day of February, 1888.

Witness my hand and the seal of said Court.

[SEAL.] NOBLE C. BUTLER,
Clerk.

COPY OF INDICTMENT.

UNITED STATES OF AMERICA, }
DISTRICT OF INDIANA, } ss:

In the District Court of the United States, for the District of Indiana, May Term, A. D. 1887, at Indianapolis.

The Grand Jurors of the United States, within and for the District of Indiana, impaneled, sworn and charged in said Court, at the

term aforesaid, to inquire for the United States, within and for the District of Indiana aforesaid, upon their oath present that Simeon Coy, Henry Spaan, John H. Councilman, Charles N. Metcalf, John E. Sullivan, Albert T. Beck, George W. Budd, Stephen Mattler, William F. A. Bernhamer and John L. Reardon, late of said District, at the District aforesaid, on the third day of November, in the year of our Lord one thousand eight hundred and eighty-six, unlawfully, knowingly and feloniously did then and there conspire, confederate and combine and agree together, and with one Samuel E. Perkins, to commit an offense against the United States in this, to-wit: The Grand Jurors aforesaid, impaneled and sworn as aforesaid, do charge and present that on the 2d day of November, in the year of our Lord one thousand eight hundred and eighty-six, an election for a Representative in the Congress of the United States from the Seventh Congressional District of the State of Indiana, was lawfully had and held in and for said Seventh Congressional District of Indiana; that the County of Marion in said State, and the City of Indianapolis, situated in said county, are, and on said 2d day of November, in the year of our Lord one thousand eight hundred and eighty-six, were in and constituted parts of said Congressional District, and that at said election for Representative in Congress, so held in said District, and in said county and city, a Representative in Congress was lawfully voted for at each and every voting precinct of said District and of said county and city, including the precincts hereafter particularly named; that at said election one Allen Hisey served and was the lawful inspector of the election at and for the second precinct of the thirteenth ward of said City of Indianapolis, and at said election said John H. Councilman served and was the lawful inspector of election at and for the second precinct of the fourth ward of said City of Indianapolis, and that at said election said Stephen Mattler served as and was the lawful

inspector of election at and for the third precinct of the thirteenth ward of said City of Indianapolis, and that at said election one Lorenz Schmidt served as and was the lawful inspector of election at and for the first precinct of the twenty-third ward of said City of Indianapolis, and one Joel A. Baker served as and was the lawful inspector of election at and for the sixth precinct of Center township in said County of Marion, and one Joseph Becker served as and was the lawful inspector of election at and for the second precinct of the eleventh ward of the City of Indianapolis aforesaid, and one Andrew Oehler served as and was the lawful inspector of election at and for the first precinct of the seventeenth ward of said City of Indianapolis, and one John Edwards served as and was the lawful inspector of election at and for the second precinct of the eighteenth ward of said City of Indianapolis.

That at and after the close of the election aforesaid, and until delivery was made to the Clerk of said county and to the Board of Canvassers of said county, each of said inspectors had in his lawful possession the ballots, tally papers, poll lists and certificate of the board of judges of election of and for the precinct of which he was and had been inspector as aforesaid; said ballots, poll lists, tally papers and certificates each contained evidence in respect to said election of Representative in Congress, and said Grand Jurors aforesaid do charge and present that at said District, on said third day of November, in the year of our Lord one thousand eight hundred and eighty-six, said defendants Simeon Coy, Henry Spaan, John H. Councilman, Charles N. Metcalf, John E. Sullivan, Albert T. Beck, George W. Budd, Stephen Mattler, William F. A. Bernhamer and John L. Reardon, intending to obtain unlawful possession of said papers and election returns so in the custody of said inspectors, and feloniously to mutilate, alter, forge and change the said poll lists, tally papers and certificates of the judges of election,

did unlawfully and feloniously conspire, confederate, combine and agree together, and with said Samuel E. Perkins, unlawfully and by false and deceitful speeches, statements, assertions and promises, and by other unlawful means to the Grand Jurors unknown, to counsel, assist, aid, procure and induce said Allen Hisey, Lorenz Schmidt, John H. Councilman, Stephen Mattler, Joel H. Baker, Joseph Becker, Andrew Oehler and John Edwards, inspectors as aforesaid, and each of them unlawfully to omit, neglect, fail and refuse to perform the duties imposed by the laws of the State of Indiana upon them and each of them safely to guard, keep and preserve from harm and danger the papers, poll lists, tally papers and certificates of the judges of election so deposited with them, the said inspectors, and each of them respectively, until lawfully delivered to the Board of Canvassers of said County of Marion, and to the Clerk of said county, and that to effect the object of said conspiracy the said Samuel E. Perkins unlawfully advised, *persuaded* and procured the said Allen Hisey, inspector as aforesaid, unlawfully and negligently to deliver to him, the said Samuel E. Perkins, the poll lists, tally papers and certificates of the judges of election deposited with him, the said Allen Hisey, for return to the Board of Canvassers of said county, before the same had been returned to the said Board of Canvassers; and said Samuel E. Perkins and Simeon Coy unlawfully persuaded, advised and procured the said Stephen Mattler unlawfully and negligently to deliver, and he, the said Stephen Mattler, consented to and did then and there unlawfully and negligently deliver to said Perkins and Coy the poll lists, tally papers and certificate of the board of judges of election deposited with him, the said Stephen Mattler, for return to the Board of Canvassers of said county, before the same had been returned to and canvassed by said Board of Canvassers; and the said John E. Sullivan and George W. Budd unlawfully received and took from Lorenz Schmidt

the poll list, tally paper and certificate of the board of judges of election deposited with said Lorenz Schmidt as aforesaid for return to the Board of Canvassers aforesaid; and the said John H. Councilman negligently and in disregard of his duty parted with and surrendered to a person or persons to the Grand Jurors unknown, the poll list, tally paper and certificate of the judges of election deposited with him, the said John H. Councilman, for return to the Board of Canvassers; and said Simeon Coy unlawfully received, procured and took from Andrew Oehler, inspector as aforesaid, the poll list, tally paper and certificate of the judges of election, deposited with him, the said Andrew Oehler, as aforesaid, to be returned to the Board of Canvassers of said county; and the said defendants Simeon Coy, Henry Spaan, John E. Sullivan, and others of the defendants to the Grand Jurors unknown, advised, persuaded and procured the said Joel A. Baker unlawfully and negligently to surrender and deliver to some person or persons to the Grand Jurors unknown, the poll list, tally paper and certificate of the judges of election deposited with him for return to the said Board of Canvassers; and said defendants Simeon Coy, Henry Spaan, John E. Sullivan, and other defendants to the Grand Jurors unknown, advised, procured and persuaded said John Edwards, inspector as aforesaid, to unlawfully and negligently deliver and to surrender to some person or persons to the Grand Jurors as aforesaid unknown, the poll list, tally paper and certificate of the judges of election deposited with him, the said John Edwards, as aforesaid, to be returned to the said Board of Canvassers; and said Simeon Coy, John H. Councilman, Henry Spaan, Charles N. Metcalf, John E. Sullivan, Albert T. Beck, George W. Budd, Stephen Mattler, William F. A. Bernhamer and John L. Reardon procured the election of said William F. A. Bernhamer as Chairman of the Board of Canvassers of said election in and for said County of Marion, in said State and

District, and said William F. A. Bernhamer as such Chairman refused to accept the poll list, tally paper and certificate of the judges of election deposited with said John H. Councilman as inspector as aforesaid, when first presented by said John H. Councilman to said Board of Canvassers and until the said tally paper and certificate of the judges of election had been unlawfully altered and forged; and further to affect the object of said conspiracy, said Simeon Coy sent one William H. Eden to said Joseph Becker, inspector as aforesaid, and to other inspectors to the Grand Jurors unknown, with direction, instruction and request to said Joseph Becker and other inspectors respectively not forthwith to return and deliver the returns of said election contained in sealed bags to the Clerk of the Circuit Court of the County of Marion aforesaid, but to unlawfully bring the same to him, the said Simeon Coy; the said Simeon Coy, Samuel E. Perkins, Henry Spaan, Charles N. Metcalf, John E. Sullivan, George W. Budd, Albert T. Beck, John L. Reardon and said persons to the Grand Jurors unknown to whom said tally papers, poll lists and certificates of judges of election were so unlawfully surrendered and delivered by said John H. Councilman, John Edwards, Allen Hisey, Lorenz Schmidt, Andrew Oehler, Stephen Mattler, Joseph Becker and Joel H. Baker respectively as aforesaid, not being then and there officers of said election, and not being then and there persons authorized by law to have the possession and custody of said poll lists, tally papers and certificates of the judges of election aforesaid, contrary to the form of the Statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

EMORY B. SELLERS,

Attorney for the U. S. for the District of Indiana.

UNITED STATES OF AMERICA,
DISTRICT OF INDIANA, } ss:

I, Noble C. Butler, Clerk of the District Court of the United States within and for the District aforesaid, do hereby certify that the above and foregoing is a full and true copy of the indictment in the case of the United States against Simeon Coy and others filed in my office on the 18th day of October, 1887, as fully as the same remains upon the files now in my office.

Witness my hand and the seal of said Court, at Indianapolis, in said District, this 4th day of February, 1888.

[SEAL.] NOBLE C. BUTLER,
Clerk.

Which is now filed.

Whereupon also comes Emory B. Sellers, Esq., District Attorney for said District of Indiana, representing the United States, and the Marshal of said District, and the jailor of said common jail of Marion County in said District, and files a demurrer to said petition in the words following, to-wit:

Comes now Emory B. Sellers, Attorney of the United States for said District, and on behalf of the Marshal of the United States and the keeper of the jail of Marion County, Indiana, demurs to the petition herein, and for cause of demurrer says said petition does not state facts sufficient to constitute a good cause for the issuance of the writ of *habeas corpus*, nor for granting the relief in said petition asked.

EMORY B. SELLERS,
U. S. Attorney.

And afterwards, to-wit: at the November term of said Court, on the 1st day of March, 1888, before the Honorable Walter Q. Gresham, Judge as aforesaid, the following further proceedings in the above entitled cause were had, to-wit:

And the Court having inspected the petition and the exhibits attached, and having heard arguments of counsel, and being sufficiently advised, now on the 1st day of March, 1888, sustains said demurrer, and declines and refuses to issue a writ of *habeas corpus* as prayed in said petition, to which ruling, action and opinion of the Court, both in sustaining said demurrer and in refusing and declining to grant and issue said writ of *habeas corpus*, the said petitioners by their counsel, at the time excepted jointly and severally; and now, jointly and severally, the said petitioners pray an appeal to the Supreme Court of the United States from said action and judgment of the Court, which prayer is now here granted.

UNITED STATES OF AMERICA,
DISTRICT OF INDIANA, } ss:

I, Noble C. Butler, Clerk of the Circuit Court of the United States within and for said District, do hereby certify that the above and foregoing is a full and true and complete transcript of the record and proceedings in the matter of the application of Simeon Coy and William F. A. Bernhamer for the writ of *habeas corpus*, as fully as the same remains upon the record now in my office.

Witness my hand and the seal of said Court, at Indianapolis, in said District, this 13th day of March, 1888.

[SEAL.]

NOBLE C. BUTLER,
Clerk.

Assignment of Errors by Appellants.

UNITED STATES OF AMERICA:

In the Supreme Court. In *Habeas Corpus.*

Ex Parte SIMEON COY and WILLIAM F. A. BERNHAMER.

Appeal from the United States circuit court for the district of Indiana.

The said appellants, Simeon Coy and William F. A. Bernhamer, jointly and severally charge and aver that there is manifest error in the proceedings, orders, and judgments of the said United States circuit court for the district of Indiana in the above and foregoing cause and record, in this, to wit:

First. The said court erred in sustaining the demurrer filed by Emory B. Sellers, Esq., U. S. attorney for the district of Indiana, on behalf of the United States marshal for the district of Indiana and the keeper of the common jail of Marion county, in the State and district of Indiana, to the appellants' petition for a writ of *habeas corpus* and to be discharged from custody.

Second. The said court erred in refusing and declining to grant and order to be issued a writ of *habeas corpus*, as prayed for by the appellants in their said petition.

Third. The court erred in sustaining the demurrer of the said United States attorney, filed on behalf of the United States marshal of said district and the keeper of the common jail of Marion county, in the said district, to the petition of the appellants for writs of *habeas corpus*, and in declining and refusing to grant such writs, as prayed for in said petition, and to which action and judgment of the court the said appellants at the time jointly and severally excepted.

Wherefore the said appellants jointly and severally pray that the proceedings, orders, and judgment of the said United States circuit court for said district of Indiana in said cause be in all things reversed.

And they further pray that this Court shall, upon such petition and record, grant such writ of *habeas corpus*, and that upon the return thereto said appellants may be discharged from imprisonment; and they pray for such further order and judgment in the premises as to the Court may seem right and lawful.

SIMEON COY,
WILLIAM F. A. BERNHAMER,
Appellants,
By CYRUS F. McNUTT, *Their Attorney.*

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No. 1395

Supreme Court of the United States.

No. 8409.—*Habeas Corpus.*

Ex Parte SIMEON COY AND WILLIAM F. A. BERNHAMER.

To the Supreme Court of the United States:

Your petitioners, Simeon Coy and William F. A. Bernhamer, by Cyrus F. McNutt and Daniel W. Voorhees, their attorneys, respectfully represent—

That by the judgment and decision of the district court of the United States for the district of Indiana, rendered on the second day of February, 1888, your petitioners were sentenced to be imprisoned at hard labor in the northern prison of the State of Indiana—your petitioner, William F. A. Bernhamer, for the period of one year, to which was added a fine in the sum of one thousand dollars, and your petitioner, Simeon Coy, for the period of eighteen months, to which was added a fine in the sum of one hundred dollars—and that your said petitioners are now restrained of their liberty and imprisoned under and by force of the sentence aforesaid.

That said judgment and sentence were rendered against your petitioners upon an indictment found by the grand jury of the United States for the district of Indiana and returned into the district court of said United States for the district aforesaid, at the May term, A. D. 1887, of the said court, a copy of which said indictment is attached to and

forms part of the record filed by your petitioners in this Court.

That, after the conviction of your said petitioners and their sentence as aforesaid, your petitioners, in due form of law, made application to the circuit court of the United States for the district of Indiana, before Walter Q. Gresham, judge of said court, on the 29th day of February, 1888, for a writ of *habeas corpus* to have your petitioners discharged from said custody and imprisonment under said conviction and sentence, for the reason that the said indictment upon which they had been so tried, copy of which was and is attached to their said application, charged no offense against the United States, and that the United States district court for the district aforesaid and the grand jury impanelled by the said court, by whom said indictment was returned, have no jurisdiction in the premises, and that the trial, conviction, and sentence of your said petitioners was and is absolutely null and void for want of jurisdiction in the said court, and because no offense against the laws of the United States was charged against your petitioners or either of them, in the said indictment, which said application of your said petitioners was by the said court duly heard and considered on the first day of March, 1888, at which said hearing the said court sustained a demurrer to the said petition and declined and refused to issue said writ of *habeas corpus* as prayed in said petition, but dismissed the same; to which ruling and judgment of the said court refusing and declining to grant and issue said writ of *habeas corpus* your said petitioners then and there duly excepted and prayed an appeal to this Court, which was duly allowed, and on the twenty-fourth day of March, A. D. 1888, filed a transcript of the record of the said appeal, duly certified by the clerk of the said circuit Court of the United States for the district of Indiana, in this Court and have had the said appeal regularly and duly docketed in this Court and the cause is now pending herein.

Your petitioners aver that they are illegally restrained of their liberty for the causes aforesaid, and that said conviction and sentence is wholly void and illegal for the reasons set forth in their said petition.

To the end that said petition may receive early consideration and they be discharged from the unlawful imprisonment now being suffered by them, your petitioners pray that the said cause may be advanced on the docket of this Court and set down for an early hearing; and as in duty bound they will ever pray.

SIMEON COY and
WM. F. A. BERNHAMER,
By D. W. VOORHEES,
Of Counsel.

Daniel W. Voorhees, being duly sworn, upon his oath says that he is one of the counsel for the petitioners, Simeon Coy and William F. A. Bernhamer, and that the facts set forth in the foregoing petition are true in substance and matter of fact, as he verily believes.

D. W. VOORHEES.

Subscribed and sworn to before me March 31, 1888.

[SEAL.] CHAS. B. BEALL,
Notary Public.

Endorsed on cover: In the Supreme Court of the United States. No. 1395. *Ex parte* Simeon Coy and Wm. F. A. Bernhamer. Motion to advance.

[Stamped:] Office Supreme Court U. S. Filed March 31, 1888. James H. McKenney, clerk.

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JAMES H. McKENNEY

IN THE UNITED STATES SUPREME COURT.

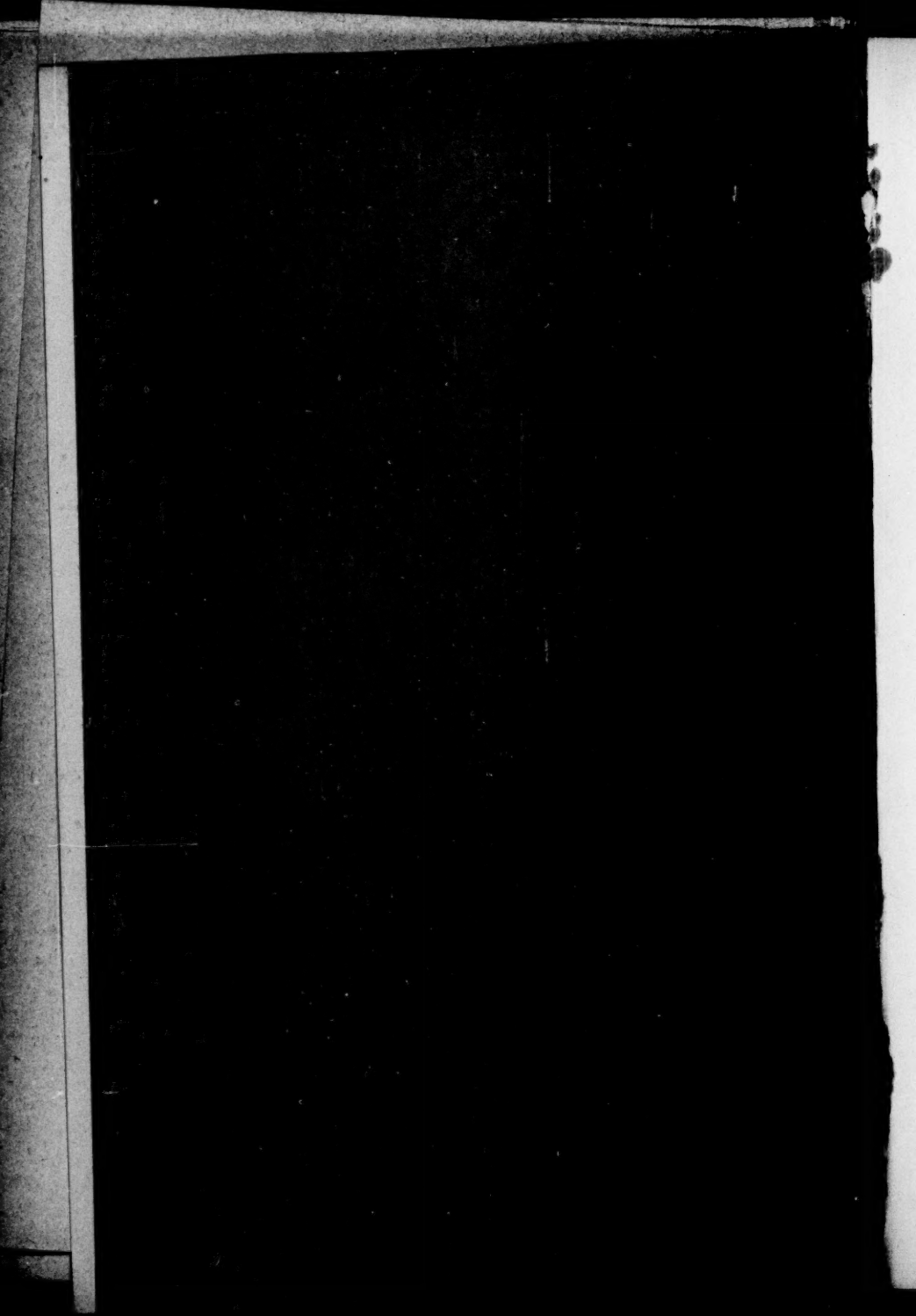
IN RE SIMEON COY
AND
WILLIAM F. A. BERNHAMER,
In Habeas Corpus

Appeal from United States Circuit Court for the District of Indiana.

APPELLANT'S BRIEF.

JOCKE & LANGEN, PRINTERS AND BINDERS, TERRE HAUTE, IND.

See Appendix for Federal & State Sta



IN THE UNITED STATES SUPREME COURT.

IN RE SIMEON COY
AND
WILLIAM F. A. BERNHAMER. } *In Habeas Corpus*

Appeal from United States Circuit Court for the District of Indiana.

APPELLANTS' BRIEF.

This cause comes here on appeal from the Circuit Court for the District of Indiana.

On the 29th day of February, 1888, Appellants filed their petition in that Court, praying a writ of *Habeas Corpus* and to be discharged from imprisonment. The record is so short that it is scarcely necessary to present an abbreviation of it, here. It will suffice to say, that in their petition, Appellants allege that the Indictment

which is exhibited with and made part of the petition, and on which they were convicted and sentenced, charges no offense cognizable in the Federal Courts; that the District Court for the District of Indiana has and had no jurisdiction of Appellants by reason of said Indictment.

To this petition by Appellants, the District Attorney filed and presented a demurrer, on behalf of the Marshal of said District, and the keeper of the jail of Marion County, in said District, which demurrer the said Circuit Court sustained and declined and refused to grant writs of *Habeas Corpus* as prayed for by Appellants, to which several rulings the Appellants at the time jointly and severally excepted—and these rulings are here assigned for error.

The charge sought to be made in the Indictment is that the Appellants and others conspired together, and with one Samuel E. Perkins, to procure and induce certain election officers created and appointed under the laws of the State of Indiana, to commit a crime against the United States; the crime of the officers being the *omission* by them (and each of them) to perform duties imposed by the laws of said State, respecting elections.

The counsel for the Government and the trial court proceeded upon the theory that an indictment in such case is good without any reference to the purpose in the officer, in omitting to do the things, the omission of which constitutes the alleged crime procured to be committed, or the purpose with which the alleged conspirators conspired to procure the crime in the officers. Nay, as we shall presently see, they go much further, maintaining and holding that if the purpose were alleged to

be harmless, *innocent*, still the crime of Appellants and their co-defendants to the indictment would be well charged. Even further yet they go, and must, (for there are no bounds in logic or reason, to the consequences of this novel doctrine) they gravely maintain that if the purpose of the alleged conspirators was to procure the election officers to omit to keep in their custody the tally sheets, etc., (that is, was to procure said officers to part with the custody of the tally sheets, etc.,) for the purpose of preventing their destruction or spoliation, yet both the alleged conspirators and the officers would be offenders against the United States, or, in the language of the learned Justice Harlan, in this case on writ of error, "*It was an immaterial circumstance what the object of the act was.*"

If this *dictum* correctly states the law, then it follows that if an officer of an election, whereat a candidate for Congress is voted for, places in the vaults of a bank for safe keeping, the returns with whose custody he is charged, he is guilty of a crime against the United States for which he may be indicted, convicted and rendered infamous. In other words: In honest faith endeavoring to save the returns from apprehended destruction, mutilation or spoliation, and, actually, *thereby preserving* them, he nevertheless commits a felony!

This reasoning must have appeared unsound to even the Government counsel; for, to palliate its harsh aspect, and, perhaps, feeling that some prop was needed to support so frail and illy proportioned a structure, they tell us that legislatures have the power to declare criminal, acts, *per se*, perfectly innocent. That power does inhere in the Parliament of England, and the Legislatures of

the States of the Union, in so far as not prohibited in its exercise by their several Constitutions; but until now no such power has been claimed for Congress. The great judges and lawyers of the land have hitherto supposed and held that Congress has no power to declare any act punishable that does not contravene, interfere with or endanger, or tend to interfere with or endanger the exercise of the powers of the Federal Government. It would be just ground of surprise, if not of alarm, if Congress should undertake to punish even its own officers (as *sub modo* these election officers are) for acts in themselves harmless, and done in good faith to protect the interests of the Government and resulting in no injury to it.

It is perhaps since the decision in *ex parte* Clark, 100 U. S., p. 399, past debate that Congress has the power under the Constitution to adopt the laws of the several states, respecting the mode of electing members of Congress, and as resulting from that power, the right to prescribe punishment for infractions of the laws so adopted. This Court has held more than once that Congress has exercised this power, and has adopted these laws, and with them the officers created under them, making them, for the purposes of the election of Representatives in Congress its officers, and has added new sanctions to such laws, and subjected such officers to the penalties of these sanctions.

All this is conceded.

But it is not conceded that Congress has undertaken or has the power to, prescribe punishment for acts not alleged to be intended to affect, or to have affected, the election of such member of Congress.

That every reasonably tenable ground may be conceded to the Government in this case, let it be understood that we do not maintain that an officer of election may not under any circumstances be guilty of an offense against the United States with respect to such election of a member of Congress, without the criminal intent; that is without evilly intending to affect wrongfully such election. If what he does, for example, in the purposed omission of a known duty, imposed by law, *affects* and was reasonably calculated to do so, the result of the election for a member of Congress, he is doubtless, under Section 5515, guilty of an offense against the United States. But we respectfully submit that the proposition that an act *per se* harmless, and resulting in no injury is, or was intended to be, made, punishable is *intolerable*—repugnant and hateful to both reason and conscience and would be without constitutional warrant.

Two inquiries, which we now beg leave to institute, arise in every case wherein one is charged with an offense against the United States!

First: Is the act charged in the indictment one for which Congress has the constitutional power to prescribe punishment; or in different words: Is the act charged, one, in its nature and qualities, *against* the United States?

Second: Has Congress, in fact, denounced the act and prescribed its punishment?

That the *power* of Congress to punish acts as offenses is *limited* by the Constitution, is a proposition familiar enough not to need repetition.

Does the Constitution confer upon Congress the power

to punish acts respecting elections and their results, which are not alleged to have been intended to affect nor in fact to have affected such elections or their results, respecting members of Congress?

The several statutes which we shall have occasion to examine, provide that if at any election at which a member of Congress is voted for any person (or officer, as the case may be) shall do certain enumerated acts, or omit to do others, such person shall, etc. Now, these sections do not say in every instance, that if these acts are done or omitted with respect to the election of a member of Congress, the officer doing or omitting them shall be punished. Yet, in every case this Court has held that such acts are punishable, only when they relate to or affect an election, in respect to such member of Congress. Why? Because Congress has no power to punish acts however flagrantly they violate the law of the State, that are not intended to and do not, in fact, affect the election of a member of Congress, and though general language is used in the statutes, it is limited to that election touching which alone Congress has power to legislate,

This has been explicitly held in *ex parte* Siebold, 100 U. S. p. 371, wherein the Court say:

"In what we have said, it must be remembered that we are dealing only with the subject of elections of Representatives to Congress. If for its own convenience a State sees fit to elect State and County officers at the same time and in conjunction with the election of Representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of

the officers of election, having exclusive reference to the election of State or county officers, they will be amenable to federal jurisdiction; nor do we understand that the enactments of Congress now under consideration have any application to such acts."

By judicial interpretation, the language of the statute is limited to those acts which Congress has power to regulate, forbid or punish.

Chief Justice Marshall, in the case of the United States vs. Wiltberger, 5. Wheaton at pages 96 and 97, well illustrates this proposition.

By the 1st section of the act of April 30, 1790, for the punishment of crimes against the United States it was provided, "that if any person or persons *owing allegiance* to the United States of America shall levy war," etc., "such person or persons shall be guilty of treason," etc.

The 2nd section defined misprision of treason and in describing the persons who may commit that offense omits the words, "owing allegiance to the United States," etc., using without limitation the words "any person or persons."

But the words, "owing allegiance to the United States," were interpolated, by judicial interpretation. Not because those words were found in the 1st section defining treason, for it is clearly stated in the opinion that no such engrafting of the words of one section upon another is permissible, but such interpretation proceeded upon the obvious ground that treason and misprision of treason can be committed by those only, from whom allegiance is due.

If, therefore, any of the sections of the Act of Congress, upon which it is sought to bottom the indictment in the case at bar, embrace language so general that it applies to acts and conduct in no way respecting the election of members of Congress, one of two results must follow: either, the sections would be, so far, void, or the language, though general, must be held to apply to those acts and that conduct which respect and affect the election of such members to Congress. And so, as we have seen, in the language quoted from Siebold's case, this Court has held.

Then may it not again be safely asserted, that an indictment which seeks to charge an offense against the United States, for violating laws of Congress respecting elections, must, to be valid, charge either that the acts averred were done with the unlawful purpose to affect the election of a member of Congress, or were unlawful and of such a character as necessarily to affect such election, or that they were unlawful and did affect injuriously such election?

But in the case at bar, whatever else, by way of Inducement or as make weight, may be found in the indictment, the real charge is that appellants (et al.) conspired together to induce certain Inspectors of Elections, at which a member of Congress was voted for, to omit a duty imposed upon them by the laws of the State of Indiana; that duty being to safely keep in their possession certain tally sheets, poll lists, etc., until they should return them to the Board of Canvassers and the Clerk of the County. What motive, whether good or evil, actuated the alleged conspirators, does not appear. No charge is made that injury to the returns affecting the

election of Congressman, was either intended or effected; nor are any facts alleged from which injury necessarily, naturally or reasonably would result to these returns in respect to said election of Congressmen.

It will be seen that the Indictment in the case at bar contains no charge of any crime in the officer, yet the *gravamen* of the charge against Appellants is that they and their co-defendants conspired together and with one Perkins to procure the officers to commit a crime. It does, to be sure, charge that the conspiracy had for its object the procuring of certain officers to omit a duty imposed by the law of the State, that duty being to safely keep certain election returns. But it fails to charge that the officers by surrendering or omitting to keep such returns committed any offense. There is no intent or purpose in the act of the officers alleged. As already suggested (granting that the law imposed the duty to safely keep, etc., the papers) this might have been cured, by an averment that the officers knowingly and unlawfully parted with the custody and posession of the papers and that the vote as to candidates for Congress had been affected (altered, forged, changed or the like) *in fact;* but the pleader purposely and scrupulously avoided any and every averment of the kind.

Nothing was better known than that in fact, there was, neither on the part of the officer nor on that of the alleged conspirators, any purpose to tamper with or affect the Congressional vote, and that in fact that vote and the returns respecting it were not *touched.* Nay, more; it is not alleged that the papers—tally sheets and poll lists—omitted to be safely kept by the officers, contained any—so much as a single vote—for candidates for Con-

gress. What is alleged as to the contents of the documents is, "*said ballots, poll lists, tally papers and certificates, each contained evidence in respect to said election of representative in Congress.*" What evidence is not shown. But, granting that this averment is sufficient, on this appeal and only objectionable for failing to set out more particularly the species of evidence, the facts and therefore only technically and not substantially defective, yet the important, substantial, and we venture to assert, controling fact remains: There is nowhere in this Indictment a charge, or any pretense of one, that there was any purpose to tamper with, alter or in any wise to affect these evidences of said election; or that the acts of the officers in parting with the returns resulted in any harm to or alteration of these evidences. Yet it is contended that the District Court has jurisdiction to try the appellants upon this Indictment.

This contention is based upon certain Federal and State Statutes, to which we shall now ask the attention of the Court.

And here it may be remarked that while the questions in this case have undergone, in the lower Courts, many discussions, Appellants and their counsel, have never as yet been advised as to what particular section, or sections, of these Statutes the charge in the Indictment is meant to be rested upon.

Section 5540, of course is relied on as defining and prescribing punishment of conspiracy, but this passed, and counsel for the Government appear to be certain of nothing.

At times it has been asserted with apparent confidence,

by both the Bench and the prosecutors, that Section 5511 of the Revised Statutes of the United States, furnished ample grounds, as respects the Federal Laws, for the Indictment. But when upon analysis it has been made clear that it in fact furnishes none whatever, a shift has been made to Section 5512, as aided in some mysterious and incomprehensible way by Section 5515.

First, let us see, if we can, what the objects of these several enactments were. What acts, or acts in relation to what subjects matter, were intended to be denounced and punished.

It is a familiar *canon* of construction that the several sections of a Statute shall, if the language allows, be construed to have a distinctive purpose. Because it is not to be presumed that the Legislature incorporates sections aimlessly or tautologically. And this rule applies with peculiar force to a criminal statute which comprises many different sections. The act of Congress wherein are found the sections invoked to sustain or in some way aid the Indictment in this case is entitled:

"Crimes against the elective Franchise and the Civil Rights of Citizens"—and contains no less than twenty-seven sections. See U. S. R. S., Chap. 7, p. 1067.

The Revisers of the Statutes, following an ancient practice, have made marginal notes, following closely if not literally those found in the original acts of Congress, embracing this statute. Now, we do not by any means maintain that these notes should have any considerable weight, yet as a historical fact they are of some significance. And these notes sustain the view that we wish to enforce, namely: that each of these several sections

has for its object the punishment of acts quite clearly distinct from those of every other section. And the text and body of each quite as clearly make manifest the same legislative intent. Referring to the several sections whose aid has been called to the support of this Indictment, and which are appended hereto, we find that *Section 5511* has on its margin:

"Fraudulent voting, etc., at elections for Representatives to Congress," Section 5512—"Fraudulent Registration, etc.," Section 5515—"Violation of duty by officers of Election," Section 5511, as originally enacted (See 16th Statutes at Large, p. 140) embraced, as it still does, *one* topic; that of *Voting*.

Section 5512, as it stood when first enacted (See same Vol., p. 141) embraced the subject of *Registration*. There was nothing in that section as enacted in 1870, in relation to elections. Its language was:

"*If at any registration of voters for any election for a representative in Congress, any person*," &c. It then proceeded to specify the acts forbidden and punished; all relating in terms to registration. As amended later and as incorporated in the Revised Statutes of 1878, certain words are added. Yet, it is quite clear, we think, that it was intended to still apply to Registration only. But since certain officers created by Congress were designated "election officers," such as "Supervisors of elections and Special Deputy Marshals," but yet had duties to perform in respect to Registration, it was necessary, in order that they might be subject to the penalties of this section, that they should be embraced within its language. Congress well and wisely concluded that in view of the rules of strict construction applied to penal

statutes, these officers could not be subjected to the penalties of this section for unlawful acts in respect to Registration. Besides, if it be maintained that these words meant to subject such officers of *election* to punishment for wrongful acts respecting the *election*, we answer that such construction places Congress in the attitude of having in two distinct sections in the same act, and separated only by two other sections, declared the same acts in the same persons, with relation to the same subject-matter offenses, and with the same penalty affixed in each section. For section 5515 provides for the punishment of all officers of elections, whether created or appointed under the laws of any State or Territory or under the laws of Congress, for any and every violation of their duties as such officers, in relation to the election of members of Congress, whether such duties relate to registration or election. Then it would seem that the objects of these several sections may be summarized thus:

Section 5511 has for its objects, 1st. The punishment of any person who votes illegally or procures others to do so, or deters persons entitled to vote from freely exercising the right or procures any officer or person to do any such act. 2d. The punishment of any person who receives an illegal vote or rejects a legal one. This latter clause must mean an officer, since none but an officer can receive or reject votes.

Section 5512 has for its object the punishment of any person or officer who corrupts or seeks to corrupt the registration of voters.

Section 5515 has for its object the punishment of any officer however created or appointed who violates his

duty, whether that duty is prescribed by the laws of the State or the United States respecting the election of a member of Congress or who violates any duties imposed by the laws of whichever sovereign, respecting the registration of voters for an election of a member of Congress.

It will be observed that the only person punished for violating the laws of the State, as such, in respect to the election of a member of Congress is *an officer of election.* If one not an officer can be punished for the violation of a law of the State governing elections, it must be done by construction. But to this proposition we shall recur further on.

Returning now to Section 5511, let us see if any support for the Indictment in the case at bar can be found. Referring to the Indictment, we find that the alleged offense is charged thus :

"And said Grand Jurors do charge and present that at etc., on etc., the defendants intending to obtain unlawful possession of said papers, etc., and feloniously to mutilate them, did unlawfully and feloniously conspire, etc., unlawfully and by false and deceitful speeches, etc., to assist and procure and induce said Allen Hisey (and others) to omit, neglect, fail and refuse to perform the duties imposed by the laws of the State of Indiana upon them, safely to keep said papers until lawfully delivered to the Board of Canvassers," etc.

Thus it appears that it was intended to charge the appellants (et al.) with conspiring to induce inspectors of elections to omit an act, the omission of which is made a crime in the officer. There is no act, such as that

charged to have been omitted, the omission of which is made a crime by section 5511. There is nothing made by that section, a crime in an officer of election, except the refusing to receive a legal vote, or the receiving of an illegal vote.

No provision is found in this section prescribing any punishment for the omission of any duty by an officer. We think this proposition is entirely too clear to need to be enlarged upon, And yet it was long insisted by counsel for the Government, that if this section did not support this Indictment, it at least aided to uphold it. And two of the learned judges before whom this question has come have, with apparent confidence, rested the sufficiency of this charge in whole or in a part upon it; though if we rightly construe the opinion of Mr. Justice Harlan, delivered in the hearing on a petition by these Appellants for a writ of error, Section 5512 is also referred to as supporting the Indictment. We venture to suggest that this very vacillation, this evident doubt, this shifting of grounds by counsel and learned judges argue, if not unanswerably, at least powerfully, against the validity of the Indictment. For the accused are as much entitled to the benefit of the doubts of judges as to the existence of grounds in the statutes to support the indictment as they are to those of the jury respecting the proof of the charge, when well grounded in the statutes.

"*The weak (hence the individual arraigned by the State) ought to have the benefit of doubt; doubt ought to be construed in mercy, not in severity. A law may be rendered milder but not more severe.*"—[Leiber's Hermeneutics, p. 172.

"*If any doubt exists in penal laws or rules, they ought to be construed in favor of the accused; of course, without injury to any one else.*"—[Ibid.

"*The more general the character of the law is, the more we ought to try strictly to adhere to the precise expression.*"—[Ibid.

But can this charge rest upon Section 5512? If our view, already set forth, that this section was intended to punish infractions of the laws regulating registration only, is correct, nothing more need be said; for it is not pretended that the acts charged had any relation to registration. Indeed the Court will take judicial notice that the State of Indiana had nor has any registration laws.

But if it is to be held that Congress meant to enact, or has in fact enacted in Section 5512, that *certain* acts of officers violative of duty shall be punished, notwithstanding the fact that Section 5515 declares that *all* acts of officers, violative of their duties, shall be punished, the penalty being exactly the same in both Sections, then a further examination of the former Section becomes necessary.

It has already been suggested that Section 5515 is the only one found in this act which prescribes punishment for the violation of the laws of a State; and this Section relates to *officers of elections only*. It is true that this Court has held that Congress has the power to adopt both the laws of the State and the officers created under them, as the laws and officers of the United States, in so far as the provisions of the former and the duties of the latter relate to the election of members of Congress. And it follows that having this

power, and having exercised it, Congress has the power, further, to prescribe punishment for the infraction of these laws. And this brings us to the inquiry already submitted herein:

"Has Congress exercised this latter power?" And if so, to what extent?

It really seems that this question ought not to be, and has not been, left in doubt by Congress.

Sections 5513 and 5515 afford answers to both branches of the inquiry.

Section 5513 declares that where registration is referred to in the foregoing sections, it shall be deemed to mean the registration provided for by the several States. So that it might be argued with some plausibility, though not, we think, with soundness, that construing Section 5512 so far as it relates to registration, and 5513 together, a crime might be constructed of which "any person" who did the things respecting registration, denounced in Section 5512, would be guilty, notwithstanding the language of Section 5512 does not provide that "*if any person did the acts in violation of the law governing registration, whether such law was enacted by any State or by Congress*," as it really seems it ought, if Congress meant to punish acts violative of State laws as such.

But when we come to Section 5515, nothing is left to doubtful construction. It plainly says that if any officer of an election whether created or appointed by the laws of a State, Territory or the United States, who shall violate any of the provisions of *this or any of the preceding sections of this act, he shall be punished, etc.* But nowhere in the act is it provided that a person, not an

officer, shall be punished for procuring such officer to violate the laws of a State; though it may possibly be, in view of Sections 5512 and 5513, that punishment is prescribed for those who violate the laws of the State respecting registration.

If it be urged that it is as important and necessary to punish persons, not officers, for the infraction of the laws of the State relating to elections as for the infraction of those relating to registration of voters, we admit the correctness of the proposition but answer in the language of this Court in the case of the United States vs. Wiltberger (*Supra*, at p. 96):

"It would be dangerous indeed to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation which it would be unsafe to consider as precedents forming a general rule for other cases." Following this rule it would be more reasonable to hold that these statutes do not make the violation of the law of a State relating to registration by a person not an officer of election, punishable—Section 5513 notwithstanding—than to extend their operations to violations, by such persons, of those State Statutes not by the terms of the law declared to be meant and embraced.

If Congress had meant the laws of the State respecting elections, as well as those relating to registration, why not have said so? Two or three words additional

in Section 5513, would have sufficed to embrace them. *These words were omitted.* They ought not to be interpolated by judicial interpretation. In the Wiltberger case (Supra at p. 95) Chief Justice Marshall, speaking for the Court, says:

"*The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals and on the plain principles that the power of punishment is vested in the legislative not in the judicial department. It is the Legislature, not the Court, which is to define a crime and ordain its punishment.*

Congress made its intention clear and unequivocal, to prescribe punishment for officers, however created or appointed, who should violate any duty imposed by the law of the State or the United States relating to the election of members of Congress, and if it had intended to punish persons not officers, for violating State laws in relation to elections it is reasonable to assume that it would have made that intention equally obvious. Indeed, the very fact that when it came to deal with officers of election, it enacted a section clear and explicit would seem sufficient argument against the theory that by Section 5511 as well as by 5512 in so far, at least, as the latter does not deal with registration, it was intended to prescribe punishment for infractions of State laws.

Then, Congress *had* the power to adopt the State laws respecting Congressional election. And it has after a manner adopted some of them. It had also the power, having adopted them, to punish their violations, by whomsoever. It has chosen to exercise this last

power so far as officers of election are concerned and *possibly*, by a liberal construction, it can be found that it has chosen to exercise the power to punish others besides officers for violating the adopted registration laws. Beyond this, we respectfully submit, Congress has not gone.

Congress has also, according to the decisions in *ex parte* Clark and Siebold (100 U. S. at pp, 399 and 371 respectively) the power to make it an offense in persons not officers to induce, etc., officers of election to violate the statutes of the State, relative to the election of Congressmen. And if that had been the legislative purpose there are easy forms of words by which it could have been effectuated. Take Section 5515, a very simple form of words:

"Or, if any person aids, counsels, etc., any voter, person or officer to do any act, by this or any preceding section, made a crime, etc.," would have been sufficient to declare such legislative intent; or, again, if Congress meant to prescribe in Section 5512, punishment for "any person" violating the laws of the State, touching such election, or for such as induced officers to violate any duty imposed by the laws of the State, it could have accomplished that intent by employing in the clause hereinbefore quoted, language like this:

"Or, if any such officer or other person having any duty to perform, etc., knowingly neglects or refuses to perform any duty required by the laws of the State, or the United States, or does any act unauthorized by any such laws, etc." As we have seen, Congress did not understand when these sections were enacted that 5511

and 5512 contained any such words as would embrace the laws of the States on the subjects matter; and hence, in order that that portion of Section 5512, which relates to registration might be made to do so, Section 5513 was enacted.

But it may be said that the language in 5511 is broad enough to embrace the State laws respecting election, since it contains this:

"Or, by any such means or other unlawful means induces any officer whose duty it is to ascertain, announce, or declare, etc., to violate or refuse to comply with *any law regulating the same*," *etc.* To this we answer that precisely the *same phrase* in the same exact relation is found in Section 5512, respecting Registration; and, yet, Congress, not understanding that the language was sufficient to embrace the laws of the States respecting Registration, proceeded to incorporate and enact Section 5513, declaring that it should be "deemed" to embrace them—not *construed* to embrace them, but that it shall embrace them; for "shall be deemed to" is equivalant to "shall" in such relation, and was the assertion of a legislative *power*, not of a legislative *construction*. Now, if Congress had intended that a like phrase in Section 5511, should embrace the laws of the States *respecting elections*, it would certainly have made it do so by like language, either in the section itself, or in Section 5513, or *somewhere*. *But, it has not chosen to do it.*

This is what Phillimore, on International Law, part 5, Chap. VIII, calls:

"*Authentic Interpretation*, or the exposition supplied by the law-giver himself."

Much stress has been placed upon the decisions of this Court in what are known as the "Siebold case" and the "Clark case." 100 U. S. at pp. 371 and 399 respectively.

Those were prosecuted under Section 5515, and were against officers of election, and so far as the point now under consideration is concerned, afford little if any light. The question in hand now could not have arisen and did not arise, in either case. And it is worthy of remark that all of the cases that have come before this Court hitherto, involving the construction of these Statutes have arisen upon Section 5515, and the persons prosecuted have been officers and prosecuted for violations of duties as such.

But it has been urged, and no doubt will be here, that since Congress has enacted no laws regulating elections of members of Congress, but has permitted the States to do so, contenting itself with affixing additional sanctions to the State laws, therefore Sections 5511 and 5512, in prescribing punishment for "any person" who violates election laws, intended the *laws of the State*. This suggestion is specious, plausible, but our answer is that neither Section 5511 nor 5512 has any language in it from which it can be judicially inferred that the law of the State was contemplated or intended. And, so Congress understood the matter; else why, by Section 5513 declaring that the registration spoken of in Section 5512 should be deemed and taken to mean the registration provided for by State laws? Besides, as we shall presently see, Congress has enacted laws regulating elections, and created election officers.

To further illustrate and enforce our view, let us take the following clause of Section 5512: "*or if any such officer or other person who has any duty to perform in relation to such registration or election in ascertaining, announcing or declaring the result thereof or in giving any certificate, document or evidence in relation thereto knowingly neglects or refuses to perform any duty required by law or violates any duty, or does any act unauthorized by law relating to or affecting such registration or election, or the result thereof or any certificate, document or evidence in relation thereto, or if any person aids, counsels, procures or advises any such voter, person or officer to do any act hereby made a crime, or to omit any act the omission of which is hereby made a crime, every such person shall be punishable, &c.*

Now, conceding for the sake of this argument, that this clause relates as well to duties respecting *elections* as *registration* if Congress had meant by "duty required by law," a duty required by the law of the State as well as its own "law" why not have said so as it has in Section 5515, or, as to the subject of Registration, it does by Section 5513.

If the legislature meant by the use of the phrase "any duty required by any law, whether enacted by any State, Territory or by Congress," why not say so, here, as elsewhere it does say so?

And having used such language in respect to officers in Section 5515, and having by Section 5513 explicitly declared that the registration mentioned should be deemed the "registration made under State laws," is it not the irresistable conclusion that such words, as would

have embraced the laws of the State as to person not officers, were purposely omitted? Then we submit that it is not "hereby," *i. e.* by Section 5512, made a crime in "any person" to aid, counsel, procure or advise an officer to omit an act imposed on such officer by the law of the State *respecting an election* for a representative in Congress, for the omission of such act is not "hereby" (by said section) made a crime.

Again, while it is true that Congress has been content to allow the States to regulate the election of its members, it has the power at any time to take the whole matter in hand and to enact such laws. And having done so such laws would be paramount. Suppose it should at the present session enact laws regulating both registration and election; what would be the effect upon Section 5512, in so far as *it* prescribes punishment for acts in relation to registration? And what the effect upon it so far as it relates to those acts in respect to elections punished by it?

As to the first inquiry:

Since the act of Congress would supersede all registration laws enacted by the States, and since Section 5513 delares that the registration made under the laws of the States shall be deemed a registration within the preceding section, would it not be, to say the least, doubtful, whether under Section 5512, "any person" could be punished for violating such registration law so enacted by Congress?

While as to the second inquiry: Since a sovereign in prescribing punishment for violation of law is conclusively presumed to intend by the "*laws*" to be violated,

those of its own enacting, unless other laws which it has the right to adopt and sanction are mentioned or in some way clearly indicated, and since in the clause of said section above set forth respecting acts affecting *elections*, nor Section 5513, designates the violation of the laws enacted by the State, on the subject as being the laws intended, would there be any doubt that under that part of the section "any person" doing the acts denounced, in violation of such supposed law of Congress, would be punishable?

But in answer to this exegesis of these several sections, and finding, we venture to think, no other avenue of escape from its logic and effect, it has been argued by counsel and held by at least one of the learned judges, before whom the question has come, that the word "hereby" found in Sections 5511 and 5512 means "by this act," that is, by any one of the twenty-seven sections of chapter 7, declaring any acts by an election officer crimes.

Professor Lieber, in his 16th rule of constructon, says:

"*Above all, be faithful in construction. Construction is the building up with given elements not the forcing of extraneous matter into a text.*"—[Lieber's Hermeneutics, p. 144.

To hold that "hereby" in the sections mentioned means anything more than "by this section" is a palpable violation of this *canon.* Extraneous matter must be forced into the text; these words, to wit: *By this chapter* (made a crime, or to omit any act, the omission of which is) "*by this chapter*" (made a crime.)

Again, at page 167 Lieber says:

"*1. The true meaning of words can be but one.*

"*2. Honest, faithful, bona fide interpretation is all important; common sense must guide us.*

"*3. Words are to be taken according to their customary not in their original or classical meaning.*

"*4. The signification of words or the meaning of a sentence, when dubious, is to be gathered from the context, or discovered by analogy or fair induction,*" etc.

If within this rule "context" means the whole act or chapter, there will be found little difficulty in interpreting the word "hereby" in these sections. For, it will be seen that when Congress, in Section 5515, intended to punish officers of election for violating or aiding or procuring others to violate the provisions of sections other than 5515, language is used expressing that intent. It was not content to use simply the word "*hereby*" which if the construction contended for by counsel for the Government is correct would have sufficed, but it employs the words: "by this" (hereby) "or by any of the preceding sections made a crime."

Much importance has been attached by the prosecution to this broad construction of the word "hereby." Only by its aid can any ligament be found connecting either 5511 or 5512, with 5515, so as to affect persons, not officers, a necessity admitted by those maintaining the substantial sufficiency, in even this one respect, of the indictment.

For no other section than 5515 provides for the punishment of election officers for violating the laws of the State respecting elections. And as the defendants to

this Indictment are charged with conspiring together to induce officers of election to omit a duty imposed by the laws of the State of Indiana, the word "hereby," must, to make the charge valid be held to knit the Section 5511 or 5512 (whichever shall be finally relied upon) to Section 5515. Not only is such construction strained and unnatural, but it may be urged moreover that to construe the word "hereby" in these sections to mean "by this act," or "by this chapter," would be clearly violative of the rule that "penal laws must be construed strictly;" a rule which Chief Justice Marshall, in the United States vs. Wiltberger *supra*, declares "is perhaps, not much less old than construction itself."

We think it may be safely asserted that such construction as that contended for by our adversaries cannot be supported by a single precedent.

In no case English or American, of the construction of a penal statute has any such latitude been indulged. Even were there doubt, the doubt must be resolved in favor of the accused. But there ought to be no doubt.

"Statutes are to be read according to the natural and obvious import of their language," is an ancient maxim. Forest vs. Forest, 10 Barb. S. C. R. p 46.

"They ought not make any constructions against the express letter of the statute, for nothing can so express the meaning of the makers of an act as their own direct words; for *index animi sermo.* Edrich's case, 5 Co. p. 118.

"Construction should lean towards personal liberty and statutes authorizing arrest, etc., are to be strictly construed." Elam vs. Ranson 21 Geo. 139.

It ought to be further observed that: When Congress meant to leash together Sections 5515 and the preceding sections, so as to subject officers of elections to punishment for acts denounced by such preceding sections, it left nothing to construction. It did not content itself with the use of the word "hereby" and leave to the Court to extend the meaning of that word so as to give it the force and scope of a whole phrase; it chose rather, to *employ* the phrase itself:

"*By this or any of the preceding sections*," not "*hereby*" —is the language used. And, so, officers were rendered amenable to all the sections, but "any person," not an officer, was not.

But it may be urged that if the words—"*any law regulating the same*" found in section 5511, do not embrace the laws of the State regulating the duties of election officers, then that section, so far as it prescribes punishment for persons not officers, is ineffectual. If this were granted, we do not see how it could weaken our position or operate to change the rules, long established, for the construction of penal statutes. But we do not concede the correctness of the proposition.

There *are*, and when the sections were enacted there *were*, many laws of Congress regulating elections of Congressmen and the duties of officers thereabout. The very chapter (seven) containing these sections (5511, 5512 and 5515) abounds in such provisions. See Sections 5521, 5522; see also 2016, 2017, 2018, 2019 and 2020, title "Elective Franchise," regulating the duties of Supervisors and special Deputy Marshals. Each of these sections under this latter title prescribes duties to be performed by Supervisors of Elections and by Special

Marshals. These are duties independent of any provision of State Legislatures. These officers are created directly by the legislation of Congress, clothed with functions and duties clearly defined in the act of their creation. And we maintain, nothing doubting, that when Congress by Section 5511 and the last part of Section 5512 denounces punishment against any person "who aids, counsels, procures or advises any such officer to do any act hereby made a crime or to omit to do any duty the omission of which is hereby made a crime, he shall be punishable," etc., it meant these officers of its own creation, for it specifies no other; and by duties "the omission of which is hereby made a crime," it meant those imposed by its own enactments, for there is nothing to indicate that it referred to duties imposed by other laws than its own.

Again, suppose a person were charged under Sections 5511 or 5512, for inducing a Supervisor of election (who is surely "an officer of an election") "to refuse to comply with his duty" as prescribed by any of the Sections 2016, 2017, 2018, 2019 or 2020, would not such person be indictable, according to the language of these sections, for an offense against the United States? Upon such a charge there would be no groping in the dim and uncertain region of surmise; no occasion to strain words; no necessity to search in alien statutes for the duty "*sought to be procured to be omitted*," that a crime might be constructed and builded up, to express which strains and contorts language, exhausting even the *infinite mood*.

Thus far we have endeavored to enforce, as showing the insufficiency of this Indictment to sustain the judgment against Appellants, these propositions:

First: That the Indictment wholly fails to aver any intent, in the acts and purposes charged against Appellants, to in anywise affect the election, or its results, or any evidence as to the election of a member of Congress; or to aver that what was done and procured by them to be done, did in fact, in any, the smallest particular, *affect* such election or its result; or to aver that the acts done or attempted, or conspired to be done and procured were such as in their nature and quality would affect reasonably and naturally such election.

Second. That there is no statute of Congress which prescribes any punishment for a person, not an officer, who induces an officer of an election to omit a duty imposed upon such officer by a statute of a State; whether such omission of duty is or is not made by the law of Congress a crime in the officer.

There is, however, another branch of this case, which, if we are in error in *both* the foregoing propositions, is necessary to be explored.

For, if by construction, Sections 5511 or 5512, which ever shall be at last relied upon, shall be held sufficient as respects the laws of Congress to support this Indictment, then the inquiry arises: Do the statutes of the State of Indiana impose any duty such as those averred upon the Inspecors of election created thereunder, and the omission of which is made a crime, in the officer, by any law of Congress?

To sustain this Indictment there must be found or constructed a ligament to bind not only Section 5511 or 5512 to Section 5515, as to persons not officers, but a longer one, that shall bind these to *some* State statute.

bringing all into such unity as that they shall stand as *one*, speaking by *one* authority, as the expression of *one* sovereign—and that sovereign the *Federal Government*.

We have believed this impossible of accomplishment, without violence to first and fundamental principles governing the construction of penal statutes. This belief has been strengthened, as we have witnessed the illogical and inconsequential reasoning of learned lawyers, while struggling to perform the feat, as well as while we were striving in vain to find satisfactory reasoning in the decisions of learned judges who believed they had performed it.

The position assumed hitherto by the counsel for the Government may be formulated thus:

1st. Congress has the power to adopt the laws of the State regulating elections of members of Congress.

2d. Congress has done so.

3d. It has the power to prescribe punishment for violations of the laws so adopted.

4th. It has done so.

As to persons not officers.

5th. The punishment is prescribed by Sections 5511 or 5512, or perhaps, both; because the word "hereby" found in each of these sections means "by this chapter" and, so, binds together and unites 5511, 5512 and 5515. And since Section 5515 prescribes punishment for the violation by officers of election of *any duty imposed by the Statutes of the State*, and since Sections 5511 and 5512, one or both, prescribe punishment for "any person" who induces an officer to omit a duty imposed by

a Statute of the State, the omission of which is made a crime by Section 5515, and since Section 4712 of the Revised Statutes of the State of Indiana, provides that when the votes of a precinct are counted and certified, such certificate, one of the lists of voters and one of the tally papers shall be deposited with the Inspector of such election, and Section 4715 of same Statute provides that such Inspector to whom the said papers have been delivered shall be a member of the Board of Canvassers, which Board when met, shall canvass and estimate the certificates, poll lists and tally papers returned by each member of said Board, therefore, 6th. If two or more persons conspire together to induce one of these inspectors to omit in the meantime to safely keep, in his possession, said papers, and one of the conspirators does any act in furtherance of the conspiracy, such persons are guilty of a conspiracy to violate the laws of the United States.

Strained, involved and complicated as these premises are, they do not exceed in extent the necessities of the prosecution in stating the grounds of their case.

It does not seem to us lawful to construct and build up a crime, so, even if each of these premises were in itself sound, a proposition, which, as to some of them, we deny.

As to the first three, we have already admitted them.

As to the fourth, we admit it, with this modification: That Congress has prescribed punishment for officers only, for violation of *State election laws.*

As to the fifth proposition we have submitted such observations and reasons as have occurred to us, show-

ing its invalidity, in so far as the construction of the word "*hereby*" and extending its meaning and significance, is involved. And this brings us to the consideration of the Indiana Statutes. Those thought to be material to a solution of the questions here presented, are appended hereto.

Sections 4712 and 4715 define whatever duties are imposed by the State laws upon Inspectors of Elections in relation to the "certficates, tally sheets and poll lists" deposited with them. The former of these sections provides for the deposit of these papers with them; the latter provides that such Inspectors shall constitute the Board of Canvassers who shall meet on the Thursday succeeding the election and when met "shall canvass and estimate the certificates, tally papers and poll lists returned by each of such Inspectors."

It will be seen that there is no express duty imposed by either of these sections, upon the Inspector to safely keep in his posession these papers from their delivery to him until their return to the Board of Canvassers. If any such duty exists it is *implied*. It is not as a statute of the State of Indiana, a penal statute. The Supreme Court of Indiana has held that it is not even mandatory, but directory only, as *all* the election statutes of that State are held by that Court to be. *See Duncan vs. Shank, 109 Ind., p. 26.* Suppose the Legislature of that State had enacted a law prescribing punishment for an election officer who failed or "omitted" to perform any duty imposed by the laws regulating elections, and suppose that such Inspector, after having received such election papers, had deposited them in his neighbor's safe, surrendering their custody to the

neighbor, until the time arrived to return them to the Board of Canvassers. He is indicted. There is no charge of evil purpose or of any evil resulting to the returns. The charge is simply that he parted with their custody for the period of two days.

Is it possible that any would maintain that such indictment was sufficient to put the Inspector upon his trial as a felon?

The prosecutor of such charge would look in vain in these Statutes for any express duty resting upon the Inspector to keep these documents in his personal custody. And we think we are entirely respectful when we say that he would look in vain for a Court ready to hold the Inspector to answer to such a charge. But suppose a Court should hold the charge sufficient, and upon the trial it should be made to appear that all these documents had been returned to the Board of Canvassers, with not a blot or blur, upon them; with not a tally changed, altered or affected, but exactly in the same plight as when delivered to the accused Inspector. Suppose that the evidence showed without a word or a suspicion to the contrary that the vote on these several documents was neither changed, nor attempted, nor intended to be changed; but had been counted and the just result reached. Is it possible that there could be found a Court, of that State to sustain a verdict of guilty and to pronounce judgment of imprisonment and infamy against the Inspector?

And yet in the case at the Bar the charge amounts to no more than that in the supposed case, so far as the vote for a representative in Congress was concerned, and

may we not be suffered to say what is now in a manner historic and known to all in the least cognizant of the trials of this case, that the evidence was upon the trial of appellants, as respects the vote for Congressman precisely as in the supposed case!

But we have conceded that Congress has the right to adopt these Statutes and to affix sanctions to them, though none have been affixed by the State. But when Congress does this, these sections instantly become penal statutes. They are at once raised to another category, they are criminal statutes—and must be construed as such; by the strict rules applied to other criminal statutes.

With this proposition steadily in view, let us examine these sections a little more critically.

As already suggested, there is no provision in any section of the State Statutes, *in terms* requiring the Inspector to keep in his personal custody the documents "deposited with" or "delivered to" him on the completion of the count, by the Election Board. The duties *expressly* imposed upon these officers who receive these papers are set forth in these words:

Section 4715: "The Inspector of each Township or precinct, or the Judge of Election to whom the certificates, poll books and tally papers shall have been delivered, as provided for in this act, shall constitute a Board of Canvassers, who shall canvass and estimate the certificates, poll lists and tally papers returned by each member of said board; for which purpose they shall assemble at the court house on the Thursday next succeeding such election, between the hours of ten A. M. and six o'clock P. M."

It has been admitted by counsel for the Government and held by his Honor the District Judge and by Mr. Justice Harlan the duty of the Inspector *to keep in his personal custody* the certificates, poll list and tally papers is not *expressed* in the statute. The former, Judge Woods, in United States vs. Coy et al, 32d Federal Reporter, p. 540, says:

"*It is therefore, a duty, partly implied and partly expressed,*" etc.

If, as the learned District Judge says, the duty, the violation of which has so been made a crime is *partly implied* and *partly expressed*, then there is no duty the violation of which *can* be made a crime, because it is not *wholly* expressed in the Indiana Statute. The courts of neither the Federal nor State Governments have any cognizance of Common Law Crimes. They have no jurisdiction of any other than those created by statutes, expressly defining the crimes, A crime cannot be raised or created by implication. A duty the violation of which is to constitute a crime, must be expressly imposed.

Mr. Justice Harlan, *In Re* Coy, 31st Federal Reporter p. 801 uses the word "implies." He says:

"*The word 'deposited' implies,*" etc. And again, same page:

"*He* (i. e. Inspector) *holds them in trust for the public; and his duty to retain them in his own exclusive custody is quite as clearly defined as if the statute had so declared in express words,*"

How can a thing be said to be *clearly* defined without the use of *words—expres words.*

Again, in the hearing on the petition of these Appellants for a writ of error before the learned Justice sitting in the Circuit Court for the District of Indiana and while delivering his judgment and opinion, not yet reported, he used the following language:

"*When we look at the extreme care which is by this act* (the Indiana Statutes)—*and it is one of the best of which I have any knowledge, and if honestly performed, it will always guard the ballot-box against fraud—when we look at the extreme care taken to guard these certificates and poll lists and tally papers and ballots, the latter being put in a sealed bag, I am prepared to repeat what I said on the former hearing, that as plain as words can do so, when the Legislature directed that those papers which are called the outside papers, shall be deposited with the Inspector and that the Board of Canvassers shall make that canvass upon the papers which shall be delivered by these Inspectors to the Board of Cavassers, it imposes as plain a duty, it seems to me, as if I were to say that two and two make four. It would be difficult to make it plainer.*"

Thus it is again asserted that the duty imposed upon the Inspector to keep in his custody the said election papers is one, not expressed by these Statutes but implied, only. And, again, we urge that crimes are not only capable of being "declared" or defined in "express words" in a Statute, but they *must be* so declared and defined. To raise a crime by implication or inference upon a Statute is, if legally possible, which may be doubted, certainly not permissible.

It has been a source of just pride with us all, that un-

der our system of State and National Criminal Jurisprudence, whenever either of these sovereigns would punish its citizen for an offense, it must by its officers, be able to lay finger upon the law, the section, the very clause *defining* the crime. It was never intended that the judiciary, by construction, by taking a section here, another there, and by interpolation of vital words, through interpretation, and then by putting this and that together, should construct, create and declare new crimes. Nor, hitherto, have the judges done so.

But only *so* can the crime sought to be charged against Appellants be created. Not only must a whole phrase, derivable from no equivalent words, be interpo lated in Sections 5511 and 5512—one or both—of the Federal Statutes, but words imposing a duty, which is not, we respectfully submit, even implied, must be sup plied in *some section*, we do not dare to suggest what section, of the laws of the State of Indiana. Would it not, if such Judicial legislation may be indulged, be better to incorporate an *additional* Section, following Section 4712, which shall read something so:

"SEC. —. The Inspector or Judge to whom such certificate, together with one of the lists of voters and one of the tally sheets have been delivered as aforesaid, shall safely and securely keep in his possession and custody said documents until the same are returned to the Board of Canvassers as hereafter provided."

True, as to these papers the State Legislature did not see fit to make any such provision, though it did as to the documents in the sealed bags, (See Sec. 4713) and, so, clearly showed that there was no intention to

impose such duty as to these; but, it is said, the duty is *implied* and the crime becomes well defined.

Bishop, in his admirable work on "Statutory Crimes," lays down some rules governing the construction of criminal statutes, to which for convenience we refer in this connection, though they are equally applicable in other connections.

Section 193 and " note 8," which cites *U. S. vs. Wiltberger supra ; 2 Bailey (S. C.) p. p. 334-5 ; 8 Pickering, 370 ; U. S. vs. Wigglesworth ; 2 Story, 369.*

Section 194 "Penal Statutes are to reach no further in meaning than their words ; no person is to be made subject to them by implication ; and all doubts concerning their interpretation are to preponderate in favor of the accused. Only those transactions are covered by them which are within both their spirit and letter.

Again:

Section 119: There are clauses of Statutes, the meaning of which the Courts restrict to their express terms, allowing nothing by implication—

Thus—Penal Statutes which deprive men of property and liberty and bring them into disgrace are construed strictly. See also Section 218.

The 5th *canon* of construction is laid down thus (See Sec. 220). " *In strict construction no case is to be brought within the statute unless completely within its words.*" *See also 98 Ill , p. 172 ; United States vs. Morrissey, 32 Federal R., p. 152 ; Ex Parte Perkins, 29 Federal R. p. 900.*

In conclusion, we submit that the Indictment set out

in the Record herein is wholly invalid, in that it fails to charge any crime cognizable in the District Court for the District of Indiana; and that, therefore the judgment therein, under which the Appellants languish in prison, is void.

Respectfully submitted,

CYRUS F. McNUTT,
JOHN G. McNUTT,
FINLEY A. McNUTT,
Of Counsel for Appellants.

APPENDIX.

Sec. 5440. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years.

Fraudulent voting, &c., at Elections for Representatives to Congress.

Sec. 5511. If, at any election for Representative or Delegate in Congress, any person knowingly personates and votes, or attempts to vote, in the name of any other person, whether living or dead, or fictitious; or votes more than once at the same election for any candidate for the same office; or votes at a place where he may not be lawfully entitled to vote; or votes without having a lawful right to vote; or does any unlawful act to secure an opportunity to vote for himself, or any other person; or by force, threat, intimidation, bribery, reward, or offer thereof, unlawfully prevents any qualified voter of any State, or of any Territory, from freely exercising the right of suffrage, or by any such means induces any voter to refuse to exercise such right, or compels or induces by any such means any officer of an election in any

such State or Territory to receive a vote from a person not legally qualified or entitled to vote; or interferes in any manner with any officer of such election in the discharge of his duties; or by any such means, or other unlawful means, induces any officer of an election or officer whose duty it is to ascertain, announce or declare the result of any such election, or give or make any certificate, document or evidence in relation thereto, to violate or refuse to comply with his duty or any law regulating the the same; or knowingly receives the vote of any person not entitled to vote, or refuses to receive the vote of any person entitled to vote, or aids, counsels, procures or advises any such voter, person or officer to do any act hereby made a crime, or omit to do any duty the omission of which is hereby made a crime, or attempt to do so, he shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three years, or by both, and shall pay the costs of the prosesution.

Fraudulent Registration, &c.

Sec. 5512. If, at any registration of voters for an election for Representative or Delegate in the Congress of the United States any person knowingly personates and registers, or attempts to register, in the name of any other person, whether living or dead, or fictitious, or fraudulently registers, or fraudulently attempts to register, not having a lawful right so to do; or does any unlawful act to secure registration for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or other unlawful means, prevents or hinders any person having a lawful right to register from duly exercising such right; or compels or induces by any of such means, or other unlawful means, any officer of registration to admit to registration any person not legally entitled thereto, or inter-

feres in any manner with any officer of registration in the discharge of his duties, or by any such means, or other unlawful means, induces any officer of registration to violate or refuse to comply with his duty, or any law regulating the same; or if any such officer knowingly and willfully registers as a voter any person not entitled to be registered, or refuses to so register any person entitled to be registered; or if any such officer or other person who has any duty to perform in relation to such registration or election, in ascertaining, announcing or declaring the result thereof, or in giving or making any certificate, document, or evidence in relation thereto, knowingly neglects or refuses to perform any duty required by law, or violates any duty imposed by law, or does any act unauthorized by law relating to or affecting such registration or election, or the result thereof, or any certificate, document or evidence in relation thereto, or if any person aids, counsels, procures, or advises any such voter, person or officer to do any act hereby made a crime, or to omit any act the omission of which is hereby made a crime, every such person shall be punishable as prescribed in the preceding section.

What deemed a Registration under last section.

Sec. 5513. Every registration made under the laws of any State or Territory, for any State or other election at which such Representative or Delegate in Congress may be chosen, shall be deemed to be a registration within the meaning of the preceding section, notwithstanding such registration is also made for the purposes of any State, Territorial or municipal election.

Sec. 5515. Every officer of an election at which any Representative or Delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district or municipal

Violation of duty by officers of Election.

law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized, with intent to affect any such election, or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such Representative or Delegate; or who withholds, conceals or destroys any certificate of record so required by law respecting the election of any such Representative or Delegate; or who neglects or refuses to make and return such certificate as required by law; or who aids, counsels, procures, or advises any voter, person, or officer to do any act by this or any of the preceding sections made a crime, or to omit to do any duty the omission of which is by this or any of such sections made a crime, or attempts to do so, shall be punished as prescribed in section fifty-five hundred and (*ten*) (eleven). [See 5511.]

STATE STATUTES.

Sec. 4712. CERTIFICATE OF JUDGES. 34. When the votes shall be counted, the board of judges shall make out a certificate, under their hands, stating the number of votes each person has received, and designating the office; which number shall be written in words; and such certificate, together with one of the lists of voters and one of the tally-papers, shall be deposited with the inspector, or with one of the judges selected by the board of judges.

Sec. 4713. CARE OF BALLOTS AND PAPERS. 35. As

soon as the votes are counted, and before the certificate of the judges, as prescribed in the foregoing section, is made out, the ballots, with one of the lists of voters and one of the tally-papers, shall, in the presence of the judges and clerks, be carefully and securely placed by the inspector, in the presence of the judges, in a strong and stout paper envelope or bag, which shall then be tightly closed and well sealed with wax by the inspector, and shall be delivered by such inspector to the County Clerk at the very earliest possible period before or on the Thursday next succeeding said election; and the inspector shall securely keep said envelope containing the ballots and papers therein, and permit no one to open said envelope or touch or tamper with said ballots or papers therein. And upon the delivery of such envelope to the Clerk, said inspector shall take and subscribe an oath, before said Clerk, that he has securely kept said envelope and the ballots and papers therein, and that, after said envelope had been closed and sealed by him in the presence of the judges and clerks, he had not suffered or permitted any person to break the seal or open said envelope, or touch or tamper with said ballots or papers, and that no person has broken such seal or opened said envelope to his knowledge; which oath shall be filed in said Clerk's office with the other election papers.

4714. CLERK'S AND TRUSTEE'S DUTIES. 36. The Clerk shall securely keep said envelope, so sealed, with the ballots and papers therein, in the same condition as it was received by him from the inspector, in his office (unless opened by said inspector, in the presence of the board of canvassers, as herein provided), for the period of six months. But when such election is contested, he shall preserve them so long as such contest is undetermined, subject to the order of the Court trying such con-

test: *Provided*, That said inspector shall, after sealing said envelope containing such ballots and one of his poll-books and tally-papers, plainly mark said envelope upon the outside, in ink, with the name, number, and township. And after each election the ballot-box herein provided for shall be, by said inspector, deposited with the Township Trustee of the township in which his precinct is situate, for safe-keeping. And said officers of election shall, upon receiving the pay for their services as such from said Township Trustee, deliver to him the keys to said ballot-box in their custody.

Sec. 4715. BOARD OF CANVASSERS. 37. The inspectors of each township or precinct, or the judges of election to whom the certificates, poll-books, and tally-papers shall have been delivered, as provided for in this Act, shall constitute a board of canvassers, who shall canvass and estimate the certificates, poll-lists, and tally-papers returned by each member of said board; for which purpose they shall assemble at the court-house on the Thursday next succeeding such election, between the hours of ten A. M. and six o'clock P. M.

4716. OFFICERS OF BOARD. 38. The members of such board who shall assemble at such time and place shall select one of their number as chairman, and the Clerk of the Circuit Court, shall act as their clerk.

Sec. 4717. DUTIES OF BOARD. 39. Such board, when organized, shall carefully compare and examine the papers intrusted to it, and aggregate and tabulate from them the vote of the county; a statement of which shall be drawn up by the Clerk, and shall contain the names of the persons voted for, the office, the number of votes given in each township and precinct to each person, the number of votes given to each in the county, and also the aggregate number of votes given; which statement shall be signed

by each member of said board; which canvass-sheet, together with such certificates, poll-pooks, and tally-papers shall be delivered to the Clerk, and by him filed in his office. The same shall be preserved by him, open to the inspection of any legal voter of the county, or district, or State.

Sec. 4718. CERTIFICATE. 40. Such board shall declare the person having the highest number of votes given for any office to be filled by the voters of a single county duly elected to such office, and certify the same in the statement above required.

Sec. 4720. DEFECTIVE PAPERS—DUTY OF BOARD. 42. No tally-paper, poll-book, or certificate returned from any election by the board of judges thereof, shall be rejected for want of form nor for lack of being strictly in accordance with the directions herein contained, if the same can be satisfactorily understood; and such board of canvassers shall, in no case, reject the returns from any precinct if the same be certified by the board of election of that precinct, as required by law, and presented to them by the inspector or one of the judges of said board.

Sec. 4721. CERTIFICATE OF ELECTION. 43. Where any person is elected to an office by the voters of a county not to be commissioned by the Governor, the Clerk of the Circuit Court shall, after ten days from the time the board of canvassers had made its return, make out and deliver, on demand, to such person, a certificate of his election; and in case where any officer is to be commissioned by the Governor, he shall make out a statement, under his hand and the seal of his Court, specifying the number of votes given to each person for each office, and who has been declared elected, and shall transmit the same, by mail, to the Secretary of State, within the time aforesaid.

Sec. 4722. DEFECTIVE RETURNS—COMMISSIONS. 44 No commission shall be withheld by the Governor on account of any defect or informality in the return of any election to the office of the Secretary of State, if it can, with reasonable certainty, be ascertained from such return what office is intended and who is entitled to such commission.

Sec. 4728. SECRETARY OF STATE AND GOVERNOR, AS TO CONGRESSMEN. The Secretary of State, as soon as he shall receive such certified statements, shall compare and estimate the votes given for Representatives in Congress, and certify to the Governor the persons having the highest number of votes as duly elected; and the Governor shall give to each of the persons returned to him, as aforesaid, a certificate of his election, sealed with the seal, and attested by the Secretary of State: *Provided*, That no return of any county which has come into his hands, and which has been duly authenticated by the Clerk thereof, under seal, as hereinbefore provided, shall be rejected by said Secretary of State, but he shall estimate, aggregate, and tabulate, and report to the Governor the total number of votes cast in each county for each candidate for State office, Supreme Judge, or other officer to be elected by all the voters of the State, and members of Congress, as evidenced to him by the face of such return so certified to him.

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Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 1395.

EX PARTE: IN THE MATTER OF SIMEON COY AND WILLIAM F. A. BERNHAMER.

APPELLANTS' SUPPLEMENTAL BRIEF.

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Judd & Detweiler, Printers.

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EX PARTE: IN THE MATTER OF SIMEON COY AND WILLIAM F. A. BERNHAMER.

APPELLANTS' SUPPLEMENTAL BRIEF.

We beg leave to submit, by way of supplement, some further observations upon the following topics:

First. What facts are necessary to be alleged under section 5440 in charging a conspiracy to commit a crime against the United States.

Second. In what respect and to what extent Congress has adopted the laws of the States relating to the election of its members; and as aiding in this inquiry reference will be made to additional authorities respecting the construction of criminal statutes.

It has not been and is not now believed necessary to enlarge upon the proposition that there can be no such thing as a criminal conspiracy where the acts conspired to be done would not, if done, constitute a crime.

The *purpose* of the conspiracy is that which characterizes

it. If that purpose be not criminal, then the conspiracy is not a *criminal conspiracy.*

United States vs. *Britton*, 108 *U. S., p.* 199.

It would seem from an inspection of the record in the case at the bar that some confusion prevailed in the mind of the judge of the district court, for it appears to have been forgotten that the prosecution is founded on section 5440. The court, after verdict, proceeded as if section 5511, or some other section of the Revised Statutes which affixes the same penalty as section 5511, were the foundation of the indictment. The punishment adjudged by the court against Coy is not, in respect of the fine, such as prescribed by section 5440. The penalty fixed by that section for its violation is a fine *not less than one thousand dollars* and not more than ten thousand dollars and imprisonment not more than two years, whereas the court assessed a fine of *one hundred dollars*. We do not complain that the fine was less than the least fixed by the law, but we call attention to the fact to enforce the truth of what has been already suggested, that the real offense sought to be charged in the indictment was lost sight of and the prosecution proceeded throughout as if appellants were being tried, not for conspiracy (under section 5440) to induce election officers to omit a duty imposed by the laws of the State of Indiana upon them, but for some other supposed offense arising on some one or more of the sections found in chapter seven of the Crimes Act.

The language of the Chief Justice, in the case of the Schooner Hoppet *vs.* The United States, 7 Cranch, p. 391, may be quoted here:

"The rule that a man shall not be charged with one crime and convicted of another may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of the rule that the accusation on which the prosecution is founded should state the crime which is to be proved and should state such a crime as will justify the judgment pronounced."

Let us again recur to the charge in the indictment in the case at bar. In simplest form and stripped of all merely formal and technical matter and averment it may be stated thus:

"That the defendants conspired together and with one Samuel E. Perkins to induce the (named) inspectors and each of them to omit a duty imposed on them by the laws of the State of Indiana to safely keep in their possession the certificates, poll-lists, and tally-papers deposited with them by the boards of election of their several precincts until they should return them to the board of canvassers and the clerk of the county, said certificates, &c., then and there containing evidence in respect to said election of Representative in Congress."

Now, believing that we have elsewhere shown, 1st, that there is no duty imposed by the laws of said State upon the inspectors to safely *keep in their possession* the certificate, poll-lists, and tally-papers delivered to them until they are returned to the board of canvassers; and, 2d, that persons *not officers* are not punishable by the law of Congress for violating the statutes of a State, it follows that these averments do not charge a conspiracy to commit a crime against the United States.

This Court, in United States *vs.* Britton, *supra*, decided that a conspiracy to procure the directors of a national bank to declare a dividend when there were no net profits with which to pay it, though the declaring of dividends under such state of facts was illegal and forbidden, was not a criminal conspiracy, because no penalty had been denounced against the illegal act. In short, the illegal act had not been declared a crime and a penalty attached.

The Court say: "This offense" (conspiracy) "does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. * * * It follows, as a rule of criminal pleading, that in an indictment for conspiracy under section 5440 the conspiracy must

be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the objects of the conspiracy." (See p. 204.)

By which we understand the Court to mean that the averments must charge that the accused conspired to do an act which Congress has declared a crime *against the United States;* and if the averments fall short of this the defect will not be cured, even though it be averred that one or more of the conspirators did, in furtherance of the conspiracy, acts which were criminal. Thus, if, as we have endeavored to show, the indictment against appellants fails to sufficiently charge a conspiracy to commit a crime against the United States, the fact, if it were a fact, that it proceeded to allege that one or more of the conspirators procured the tally-papers and changed the vote for Representative in Congress would not mend it. The indictment must stand or fall as it is found sufficient or insufficient in its averment of the conspiracy.

United States vs. *Britton, supra.*

The Hoppet & Cargo vs. *United States*, 1 *Cranch*, 391.

Boyd vs. *United States*, 116 *U. S.*, 634.

United States vs. *Cruikshank et al.*, 92 *U. S., p.* 542 (*at pp.* 557, 558, 559, 562, 563, 564, 569).

SECOND. *In what respect and to what extent Congress has adopted the laws of the States relating to the election of its members.*

But for the decisions of this Court in the cases of Seibold and Clark, already cited, we should have been inclined to the opinion that Congress has not done so at all; or, if at all, that it has not done so pursuant to the methods indicated by the Constitution. While we have no purpose to ask this Court to reconsider the questions determined by those cases, we beg leave to refer to the provision of the Constitution and to make some observations thereon to show that as respects persons not officers Congress could not have

intended to punish such for offenses to ascertain which resort must be had to the laws of the State.

The Constitution (first clause, fourth section of article first) reads as follows:

"The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each of the States by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing Senators."

An examination of the laws of Congress upon the subject will disclose that, as to the mode of conducting elections, it has enacted no statute altering or making any regulations. It has allowed the regulations prescribed by the Legislatures of the several States to stand *unaltered* in most regards.

The only alterations are these: By act of February 28, 1871, it is required that the vote for members of Congress shall be by printed ballot. By act of February 2, 1872, it is provided that Representatives in Congress shall be elected by districts, which districts shall comprise contiguous territory, and that in the year 1876 and every two years thereafter the election for Representatives shall be held in all the States on the Tuesday after the first Monday in November. By other acts, to which reference has been made elsewhere, Congress has also created certain election officers (supervisors of elections and deputy marshals), whose powers are co-operative with rather than different from those of the officers created by the States. True, the duties of these officers are prescribed wholly by Congress, but they are such as, if honestly performed, will conduce to an honest election according to the mode prescribed by the given State, with whose officers they may be appointed to co-operate.

If Congress has "*made*" any other "regulations" or in any other respects "*altered*" those "prescribed" by the States, the law by which it has been done has escaped our attention.

It has not attempted or pretended to alter the methods of procedure in, the places of holding or the manner of ascertaining or declaring the result of, elections for Representatives in Congress. It has been content to leave the matter in these respects where the Constitution places it, *primarily;* with the Legislatures of the several States. It seems quite evident that it was the purpose of the framers of the Constitution that the States should, if they would do so reasonably, prudently, and justly, regulate the election of members of Congress, the ultimate power to do so being vested in Congress, to be exercised by it if deemed necessary.

For example: If a State failed to make provisions for such election it was meant that Congress should not be left powerless to remedy the evil, but should in such event "make" the necessary "regulations;" or, if the States or any of them made unreasonable or unfair laws or laws not efficacious to the end, it was meant that Congress should have the power to "alter" these.

See "*Story on the Constitution*," *Vol. I, secs.* 814, 822, 825, *and* 826."

It would really seem that there is nothing in the Constitution authorizing Congress to *adopt* the laws of the State, nor can a necessity for doing so well be conceived. If the laws prescribed by the States, where the power resides primarily, are satisfactory to Congress they need no *adoption*, since, having been made by competent authority, they are, without any action of Congress, the absolute rule of conduct by which all must be governed.

If they are not satisfactory to Congress it may so alter them as to make them conform to its will and wishes, or it may make wholly new regulations. If the States or any of them *fail* to enact any laws on the subject Congress may "make the regulations," but that it may or need *adopt* those enacted by the States would not, but for the decisions in the cases of Seibold and Clark, *supra*, be so clear.

If we rightly apprehend the decision in the latter case it really determined no more than this: That Congress had the power under the clause of the Constitution above set forth to enact section 5515, which provides that if any *officer of an election* at which a member of Congress is voted for, whether such officer is created or appointed under the laws of a State or of the United States, violates any duty imposed upon him, whether so imposed by the laws of the State or of the United States, he shall be punished, &c.

This Court held that by this section Congress adopted the officers of election created by the laws of the States as its officers (so far as the election of members of Congress is concerned) as effectually as if such officers had been created by its own statutes; and that, having so made them its own, it provided that if, while acting as such, they did any act to wrongfully affect the election in which the United States are concerned they should be punished by the courts of that sovereign.

It was as if Congress had said: We are content with the laws prescribed by the States in so far as these have not been altered by us. We are content with such officers as have been created by the States to administer those laws, but to enforce respect and faithful observance of duty toward the United States we will add the sanction of Congress to the laws prescribing their duties to the United States, so that if any such officer while administering such laws in respect of the election of a member of Congress violates or omits any duty imposed by those laws he shall be punished by the sovereign against whom the wrong is done.

This, we submit, is as far as the decision in the Clark case goes. Nor does that of Seibold's case go further in this direction, though other questions are determined by it; but, to embrace the case attempted to be made in the indictment in the record at the bar now, it is necessary that the court shall go further—much further, we think. Both Clark and Seibold were officers of election, created by the laws of their

respective States. The charges against them were for acts done as officers, under color and by reason of their official character. They were, if guilty of the offenses charged against them, within the *very words*—the "express words"—of section 5515 of the Revised Statutes of the United States. So, when the Court held that Congress had the power to enact that section, no question remained, for it appears that no other question was made by Clark; and no other question the solution of which can aid the prosecution in the case at the bar was made by Seibold.

But we repeat that no other section than 5515 (except 5513, in respect of the registration prescribed by the laws of the States) prescribes penalties for the violation of State laws as such. Only by a most liberal rule of construction, such as this Court has never applied to the construction and interpretation of penal statutes, can any other section of chapter seven be made to embrace violations of State laws. From the beginning this Court has adopted and applied the rules and doctrines of strict construction in the interpretation of penal statutes.

If there has been any departure from or relaxation of these rules it has occurred in cases of violations of the revenue laws, and then chiefly, we think, in proceedings against property, and then upon the theory, it seems, that such laws are not *technically* penal. For in the case of *Taylor* vs. *United States*, 3 *Howard*, *p* 201, the Court (Mr. Justice Story delivering the opinion) say:

"Upon the point that revenue laws, upon which the information was founded, were not * * * to be deemed penal laws in the sense in which that phrase is sometimes used, it may be proper to say a few words. * * * In one sense every law imposing a penalty or forfeiture may be deemed a penal law. In another sense such laws are deemed and truly deserve to be called remedial. The judge (below) was therefore strictly accurate when he stated that 'it must not be understood that every law which imposes a penalty is therefore, legally speaking, a penal law—that is, a law

which is to be construed with great strictness in favor of the defendant.'"

Authorities sustaining this view are cited by the Court.

But in the prosecution of persons under strictly criminal statutes the rules of strict construction have been steadily adhered to by this Court. We cite a few of the many cases supporting this proposition:

United States vs. *Wiltberger, supra.*
United States vs. *Britton, supra.*
United States vs. *Scott, supra.*
The Hoppet vs. *United States, supra.*
United States vs. *Carll*, 195 *U. S., p.* 611.
United States vs. *Fox*, 95 *U. S.*, 670 *and* 672.
United States vs. *An Open Boat*, 5 *Mason*, 142.
United States vs. *Cruikshank et al., supra.*

But there is another aspect of the indictment in this case worthy of some observation.

Granting that Congress may adopt and has adopted the laws of the States in relation to the election of its members, what ought to follow? Do the laws so adopted become the laws of Congress?

It will be observed that the charge in the indictment is that the conspiracy charged against the defendants (appellants and others) was to induce the inspectors to omit a duty imposed by the laws of the State of Indiana. There being no other instance, we believe, in which Congress can adopt the laws of the States respecting a matter of legislation on which both sovereigns may legislate, we are without analogy to give us light or guidance; but it really seems that the practice pursued in this case cannot be sustained upon any theory. If the laws of the State may be and have been adopted, then their violation is the violation of a law of Congress, and the allegation that the violation to induce which was the object of the conspiracy was a violation of

the laws of the State of Indiana is insufficient and charges no unlawful purpose.

If, on the other hand, Congress may not adopt or, having the power to, yet has not adopted them, then it would seem entirely clear that a conspiracy to induce election officers to violate them cannot be prosecuted or punished in the courts of the United States.

But in our views of this case, as attempted to be set forth in these briefs, this aspect of it is not of such importance as it would be were the appellants officers and prosecuted as such under section 5515, since, if any one of the many other grounds on which we rest the cause of appellants is found well sustained, these suggestions will not require consideration.

Very respectfully submitted,

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Attorneys for Appellants.

127-931

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Supreme Court U. S.
FILED
APR 16 1888
JAMES H. McKENNEY

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

EX PARTE SIMEON COY AND WILLIAM F. A. BERNHAMER, appellants. } No. 1395.

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BRIEF FOR THE UNITED STATES.

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The appellants claim that they have been tried and convicted in the district court of Indiana upon an indictment that is invalid, because the "grand jury" finding it "had no jurisdiction in the premises," and the court was without jurisdiction also, and, in fact, the whole proceeding thereunder is void for the want of jurisdiction; and having assigned these reasons to and before Circuit Judge Gresham for their release from imprisonment under judgment on such indictment, and he having declined to grant their petition, but holding they are imprisoned under a valid indictment, they appeal to this court for relief.

The indictment is to be found correctly copied (Rec., p. 4–9).

And probably all that is really needed of it here to acquaint the court with its merits in this inquiry, is the one portion charging the offense that is claimed to have been committed, that is, after naming these and other parties, and charging them with intention of getting unlawful possession of poll lists, tally papers, etc., of an election at which a member of Congress was chosen, and to mutilate, alter, forge, and change them "did unlawfully and feloniously conspire, confederate, combine, and agree together, and with said Samuel E. Perkins, unlawfully and by false and deceitful speeches, statements, assertions and promises, and by other unlawful means to the grand jurors unkown, to counsel, assist, aid, procure and induce said Allen Hisey, Lorenz Schmidt, John H. Councilman, Stephen Mattler, Joel H. Baker, Joseph Becker, Andrew Oehler, and John Edwards, inspectors as aforesaid, and each of them, unlawfully to omit, neglect, fail and refuse to perform the duties imposed by the laws of the State of Indiana upon them, and each of them safely to guard, keep, and preserve from harm and danger the papers, poll lists, tally papers and certificates of the judges of the election so deposited with them."

Or, in other words, to simplify: conspiracy is charged against these parties and others to aid and procure officers of election, Congressional—

> *To omit, neglect, fail and refuse to perform the duties imposed by law * * * safely to guard, keep and preserve from harm and danger the papers, poll lists, tally papers and certificates of the judges of election so deposited with them.*

The question then is, does this charge set forth an offense cognizable in the district court of Indiana?

Before entering into the discussion of the point presented, it may be well to remark as a part of the history of this case the indictment assailed here has stood a most severe crucial test; in fact, it has run the judicial gauntlet in a manner almost unexampled in the history of criminal proceedings. It may be said it has gone through the fiery furnace of the law and has come out unscorched. For, after the parties were arrested, but before trial, on an indictment substantially the same as this, the appellant, Coy, applied to Mr. Justice Harlan to be released on the grounds presented in this appeal. After full hearing and consideration this application was denied, and an elaborate and convincing opinion was rendered, in which the indictment was upheld and the party remanded to be tried under it (opinion printed in appendix hereto; 31 Fed. Rep., 795, *et seq.*). This opinion would appear, on careful reading, to dispose of all grounds of controversy herein. But after that, the parties were tried in the district court on a new indictment, differing in no material sense from the one passed on by Mr. Justice Harlan, which is the present indictment, and it was assaulted violently and by all sorts of motions, before and after trial (Rec., pp. 2, 3), and it was again upheld by the district judge in an opinion on a motion to quash, covering the whole ground (32 Fed. Rep., 538); and again, on February 27, 1888, the same judge, on the trial, in his charge to the jury reviewed the questions most fully, and this charge would seem to be entirely sufficient on the matter in dispute. (It is printed here as part of the appendix.)

Not in the least daunted or discouraged, the appellants, immediately after the trial, applied to Mr. Justice Harlan for a writ of error, and on the 28th of February last, in another exhaustive opinion, he goes over this whole subject and upholds the indictment once more. That opinion is printed herewith as a part of the appendix, taken from a stenographic report of it at the time of its delivery.

It is scarcely within the range of probability or possibility that anything whatever is left of the question after this. And it must be borne in mind, that seven months elapsed between the first and last utterances of the circuit justice, and with this time for reflection and thought over the subject, there is no change or shadow of change in the two declarations.

But the appellants, in no wise deterred, and apparently not convinced by these several opinions, move again for release on habeas corpus before Circuit Judge Gresham, and he sustains a demurrer to the petition and refuses the writ prayed for (Rec., p. 11).*

Upon this sketch of these events there arise these queries:

(1) When the act of March 3, 1885 (laws Forty-eighth Congress, second session, ch. 353, p. 437), restored appellate jurisdiction to this court in habeas corpus cases over decisions of circuit courts of the United States, etc., what was meant by circuit courts? How many efforts are allowable before the circuit courts? When is the exercise of the right to stop? In this case Mr. Justice Harlan passed on exactly the matter here presented, and no other,

* Judge Gresham, it seems, left the case where Mr. Justice Harlan had, and declined to review his decision in the premises.

so far as the law of the case is concerned. Then and there was entered the judgment of the circuit court in that district. But after that, and after trial and conviction, another application is made to the circuit judge of that circuit, with Justice Harlan's decision precisely on the same subject standing unreversed, and not in fact brought up for review, and so of his opinion on the application for writ of error. Can this, in truth, then, be an appeal from the circuit court? It would seem not. Suppose Judge Gresham is reversed, Justice Harlan's opinions are untouched and must stand, under our system of courts, as the judgment of the circuit court there. Are not these parties bound by Justice Harlan's decisions, or are they not the law of the case until set aside? What is there to take this proceeding out of the operation of the very familiar rule that a fact in controversy once decided by a competent tribunal can not be re-examined by another court of concurrent jurisdiction? Indeed, it is held the same principle applies in habeas corpus cases as in others (*Webb* v. *Rocky-Hill*, 21 Conn., 474). Indeed Judge Gresham considered, when the matter was before him, that it was adjudicated upon the opinions of Mr. Justice Harlan.

It seems these applications were before these two officials sitting as a court, and not as judges merely, and no question can arise as came up in *Carper* v. *Fitzgerald* (121 U. S. R., 87).

(2) Is the subject-matter in controversy reviewable here at all? The one and only question in hand is, is there alleged in the indictment a crime against the laws of the United States triable before the district court of Indiana (Rec., p. 3)? That is a question that court must decide,

and it can not be reviewed here in this manner. In the absence of an objection on constitutional grounds to the laws under which these proceedings were had, there would appear to be no question for this court to pass upon (*ex parte Parks*, 93 U. S. R., 18 *et seq.*; *ex parte Crouch*, 112 U. S. R., 178, and cases cited on page 180).

It would be a waste of time and labor to attempt here, with these several discussions by the judges below before the court, to make anything like a labored or extended argument, and it would be oppressive to the court. A succinct statement of the points involved with reference to authorities is all that is needed.

The power of Congress to adopt State laws regulating elections, where Representatives in Congress are chosen, to the same extent as if enacted by Congress in so many words, is no longer an open question (*Siebold's Case*, 100 U. S. R., 371; *Clarke's Case*, *Ib.*, 399; *Gale's Case*, 109 *Ib.*, 66; *Yarbrough's Case*, 110 *Ib.*, 651).

That these State officers are amenable to State laws also is nothing to the purpose. "It may be but one act that is done, but two offenses are committed, for each of which the party is justly punishable." Justice Grier in *Moore* v. *Illinois* (14 How., 20), and this is well illustrated in the case of *Fox* v. *Ohio* (5 How., 432), *Marigold's Case* (9 *Ib.*, 560), and more recently in *United States* v. *Arjona* (120 U. S. R., 487). No new or unusual thing for the General Government to resort to State agencies, officers, and tribunals to enforce and carry out its purposes. See full review of this practice by Justice Field in *United States* v. *Jones* (109 U. S. R., 519 *et seq.*). No sensitiveness should be felt on this subject, since this court, through Justice

Clifford, in *United States* v. *Hall* (98 U.S. R., 343), without dissent, held a guardian in a State, appointed by and under State laws and responsible to them through State tribunals, could be punished by act of Congress for misusing pension money of his ward.

These election papers are in the nature of joint property of the State and the United States, and while the State can punish under her laws for all approaches or attempts on their safe-keeping and preservation, as affecting her rights, so can the United States to the same extent as affecting her rights. There can be in the very nature of things no difference in this respect.

The statutes, Federal and State, upon which the indictment is based, are correctly copied in appellant's brief (appendix, 1–8). The relation of the several Federal statutes (sections 5511, 5512, and 5515) is fully stated and explained in the opinions of Mr. Justice Harlan in the appendix hereto; and the Indiana statutes are also set out and examined in these opinions.

Section 5511 makes it unlawful for any person to interfere with any officer of election, etc., or aid, counsel, procure, or advise to do any act hereby made a crime, or omit, etc. (see 31 Feb. Rep., 796; same opinion in appendix hereto). "Hereby" means by the *act*, not the *section* (*Ib.*). This is a part of a whole election law, a scheme to protect elections from fraud, and not a mere shield or defense for one particular part of it; it is a unit, a whole, and can be interpreted only in this way. It leaves the election without protection or guard if read otherwise This is clearly deducible from the original statutes themselves (16 Stat. L., 140–145, sections 19, 20).

Bishop stat. crimes Sects. 64-67-82-118a;
Scott v. State. 22 Arks. 369:

Section 5512 also covers offense charged. (See same opinions.)

Section 5515 defines duties of election officers and adopts State laws as regulating Congressional elections, and State officers are, to this extent, officers of the United States, and amenable to Federal laws. In addition to cases already cited see *United States* v. *Boder* (16 Fed. Rep., 116); *United States* v. *Jackson* (25 Fed. Rep., 548); *United States* v. *Baldridge* (11 Fed. Rep., 552).

The indictment (Rec., 4–9) charges conspiracy to aid, procure, etc., officers of election (Congressional) to "omit, neglect, fail, and refuse to perform the duties imposed by law," to wit, "safely to guard, keep, and preserve from harm and danger the papers, poll-lists, tally papers, and certificates of the judges of election so deposited with them," and that certain acts were done to accomplish the object of the conspiracy.

It is alleged that these papers contained the evidence of the election of a Representative in Congress (see *ex parte Clarke, supra; U. S.* v. *Baldridge*, 11 Fed. Rep., 552, and other cases above cited).

This charge covers both sets of returns required by sections 4712, 4713, 4714, 4715, 4716, and 4717, Revised Statutes of Indiana, 1881 (appendix to appellants' brief).

The acts done to accomplish the object of the conspiracy related to both sets of papers, as charged in the indictment.

It was the duty of the inspector to safely guard, keep, and preserve from harm, and in his own possession, these returns (see section 4713 as to sealed bag in which papers

are to be put and kept; also section 4712 as to "outside" papers; see opinions in appendix).

Section 4712 says, "outside papers, so-called, shall be deposited with the inspector, etc." "Deposit." "To lay away for safe-keeping; that which is placed in one's hands for safe-keeping."

For distinction between neglect of duty and acts unauthorized by law see 11 Fed. Rep., 552; 25 *Ib.*, 548 and cases cited; 31 *Ib.*, 795.

Taking these statutes as a whole, prescribing one scheme to protect elections, it is not necessary to base indictment upon any one section.

The question of "crimes by implication" is sufficiently discussed by the district judge in 32 Fed. Rep., *supra*, and he shows conclusively that there is nothing in that suggestion to affect this case.

Nor is it necessary, as it seems to be claimed, that the statute should say expressly such and such acts are crimes or offenses, but the mere forbidding them and fixing a penalty for committing them make them crimes or offenses. Nearly all of the statutes of this day are of this tenor (see the statute in 98 U. S. R., *supra*). A similar point raised in Arjona's Case, *supra*, was held of no avail.

In appellants' brief (p. 34) a supposed case is put, which, however, by no means exists here. But unquestionably in the case stated the party would be guilty because he had not kept the papers as the law said he should keep them. The law puts in no intention at all, but it says positively "shall" or "shall not"—a positive command—and that is enough. "The courts can not supply qualifi-

cations which the legislature has failed to express" (*U. S.* v. *Fox*, 95 U. S. R., 670–673).

The question of intention might figure in estimating the amount of punishment to be affixed, that is all. As if an action for damages were instituted by some person injured by the acts alleged, the intention would be considered in estimating the damages and it might turn out to be a case of nominal damage. Under section 713, Revised Statutes, no judge of the United States can practice law; it is positively prohibited. Suppose Judge A should, nevertheless, undertake to practice; could he be heard to say, "I did not do it for mere gain, but for harmless amusement?" No, because the kind of harmless amusement, as that of not keeping election papers in their proper place, although not blurred or touched, is denied and abolished.

The court will not fail to remember that it is now engaged in considering laws of the United States, although laws of Indiana adopted by Congress for convenience, in reference to elections affecting Rpresentatives in the United States Congress, and it must put its own construction on them with a view to the end and object of those laws. This is a convenient method and less expensive than to have separate machinery in these elections, and they must be correctly and wisely enforced for the security of Federal elections, or Congress must of necessity resort to a plan of its own, independent and outside of State laws. And here it is a simple question of cutting off all approach to these papers until they have finally performed their office. And the only inquiry is: Did Congress intend to prevent all chances of access to them?

It is true, criminal laws are construed strictly, but criminal laws are not, nor are any other laws, construed to defeat their purposes. And if the purpose, to prevent all possible means of getting at these papers until their work was done, does not exist in these laws, or existing in them, is defeated, then this whole scheme of protection to elections is valueless, utterly.

E. B. SELLERS,
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Attorney-General, for the United States.

APPENDIX.

JUDGE HARLAN'S DECISION.

This case is before me under an act of Congress approved March 3, 1879, entitled "An act to give the circuit court of the United States appellate jurisdiction in certain criminal cases." The first section provides that the circuit court for each judicial district shall have jurisdiction of writs of errors in all criminal cases tried before the district court where the sentence is imprisonment or fine and imprisonment, and where, if fine only, the fine shall exceed the sum of $300; and in such cases a respondent feeling himself aggrieved by the decision of the district court may except to the opinion of the court and tender his bill of exceptions, which shall be settled and allowed according to the truth, and signed by the judge as a part of the record of the case. The second section of the statute provides that within one year next after the end of the term at which such sentence shall be pronounced, and not after, the respondent may petition for a writ of error from a judgment of the district court in the cases just named, which petition shall be presented to the circuit court or circuit justice in term or in vacation, and on consideration of the importance and difficulty of the questions presented in the record may allow such writ of error, and may order that such writ shall operate as a stay of proceedings under the sentence, but the allowance of such writ shall not so operate without such order.

The case now before me is an application for a writ of error to bring up to the circuit court the judgment of the

district court in the case of the United States against Simeon Coy and another, in which the judgment of the court was of the character described in the first section of the act. That application was presented to me at the city of Washington, and upon reading the act I came to the conclusion that I could not properly pass upon the application for the writ of error unless the record of the trial was presented. At that time the applicants had not had sufficient time in which to prepare the bill of exceptions or to obtain a transcript of the record. I therefore postponed the hearing of the application until the 24th of this month, in order that they might obtain the record, notifying counsel at the time that I would, upon the hearing of that application, consider the merits of the question which the bills of exception might raise. I did this partly because the case could not otherwise have been heard until the next term of court, during which it was highly probable I could not be in attendance; and therefore, in passing upon the application for the writ of error, I have considered the questions raised by counsel just as fully as I should have considered them had the writ of error been allowed, and the questions formally raised in the circuit court at its regular term.

The first question naturally presented in the consideration of the application in the case is the motion made quite early in the trial in the district court to quash the indictment. That motion necessarily raised questions involving the jurisdiction of the district court of the United States to proceed in such a case. The district courts of the United States have, by the statutes regulating their powers, "jurisdiction of all crimes and offenses cognizable under the authority of the United States committed within their respective districts," and therefore the question first presented is whether or not the offense charged in this indictment is an offense against the United States. [Justice Harlan here read from the indictment.] Now I have

read enough of that indictment to indicate the charge. Section 5440 of the Revised Statutes provides:

"If two or more persons conspire either to commit any offense against the United States, * * * and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than $10,000, and to imprisonment not more than three years."

This indictment is framed under that section and charges a conspiracy to commit an offense against the United States. So that the first question is whether or not this offense charged in the indictment is an offense against the United States. That involves an examination of certain sections of the Revised Statutes, section 5511 being the first one:

"If at any election for Representative or Delegate in Congress any person knowingly personates and votes, or attempts to vote, in the name of any other person, whether living, dead, or fictitious, or votes more than once at the same election for any candidate for the same office, or votes at a place where he may not be lawfully entitled to vote."

There follows immediately the description of several other offenses of like character, until we reach in the section these words:

"Or by any such means, or other unlawful means, induces any officer of an election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty or any law regulating the same, or knowingly receives the vote of any person not entitled to vote, or refuses to receive the vote of any person entitled to vote, or aids, counsels, procures, or advises any such voter, person, or officer to do any act hereby made a crime, or omit to do any duty, the omission of which is hereby made

a crime, or attempt to do so, he shall be punished by a fine, etc."

This section and the succeeding section, section 5515, with other sections in this chapter of the Revised Statutes, are brought forward from an act of Congress passed in 1870, entitled "An act to enforce the right of citizens of the United States to vote in the several States of this Union, and for other purposes." There is no substantial difference between section 5511, which I have read, and the corresponding section in the act of 1870. Upon analyzing that section 5511 it will be found that there is embodied in it some eight or ten different distinct offenses. It is beyond dispute, as it seems to me, that that section, in the words that I have just read, wherein it declares that, if any person, by any unlawful means, induces any officer of election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty, or any law regulating the same—these words standing by themselves in the statute, and disconnected from anything else in that section, define an offense against the United States, if that offense, as charged, has any reference to an election for Representative or Delegate in Congress. Lower down in the section are these words:

"If any person shall aid, counsel, procure, or advise any such voter, person, or officer to do any act hereby made a crime, or omit to do any duty, the omission of which is hereby made a crime, he shall be punished by a fine, etc."

The argument was made with great earnestness and force before me to the effect that the word "hereby" is to be limited to section 5511; and that as there can not be found in that section any duty prescribed, the omission of which is by that section made a crime, the conclusion, it was contended, inevitably followed that that section made no provision for punishing the crime which is here charged.

I recall very well—though I did not deem it necessary at that time to discuss the question in the opinion which I delivered last summer in the habeas corpus case of Coy—I recall very well that I considered that question at that time, and reached the conclusion that "hereby" in that section referred to the whole of that chapter; and hence it was that in the opinion which I delivered on that occasion I referred to section 5515, which says that "every officer of an election at which a Representative or Delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, Territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or who violates any duty so imposed," shall be punished as prescribed in section 5511; and in the habeas corpus case of Coy I said, in substance, that there was a section which did prescribe a duty to the United States upon the part of officers of the election, the failure to do which was made a crime, and that, connecting 5511 with 5515, a clear case was made out of an offense against the United States by any person who, by any unlawful means, induced an officer of election to omit to perform any duty in reference to that election. It was not necessary for me at that time to go further and determine whether or not section 5511 was not sufficient, in and by itself, to sustain a prosecution of this sort, if there was no other objection to the prosecution than that to be derived from the face of the act, but the question has been made in such a distinct form in the present argument that I have felt obliged to review that question and to pass upon it.

I am of opinion, I repeat, that the word "hereby," in that section, embraces the whole of that chapter. We can not otherwise construe it upon any fair view of what was the object of Congress in passing the act of

1870, from which these sections are taken. For instance, as an illustration, in section 11 of that act there is a penalty for knowingly and willfully obstructing the execution of process, wherein you will find the words "when so arrested pursuant to the authority herein given and declared." If the argument which has been made upon this hearing be sound, I should be bound by a prosecution under that act to construe the word "herein" as referring only to section 11 of that act. What Congress meant by this act was to enforce the rights of citizens of the United States to vote in the several States of this Union. It intended to throw around the election for Representative in the Congress of the United States the whole power of the United States. It did not intend to exercise all the power it had and take complete charge of the election for Representatives in Congress. It intended to leave, just where it had been left since the foundation of the Government, in the hands of the States to prescribe the mode in which those elections were conducted, but it did intend that when the law of the State imposed any duty upon an officer at any election for Representative or Delegate in Congress, that that duty should be discharged by that officer, and that his failure to discharge such duty should be an offense against the United States; and it intended to say to every human being in this country, "If you, by any unlawful means, induce an officer of election to violate any duty imposed upon him by any law regulating that election for Representative or Delegate in Congress; if you by any unlawful means or in any way aid, counsel, procure, or advise that officer to omit to do any duty imposed upon him by law, you shall be liable to a punishment." The words "or omit to do any duty, the omission of which is hereby made a crime," apply not only to officers of election, for when you examine the law from which they were taken, there were duties prescribed there for registers of election, the regis-

tration of voters; duties were prescribed for marshals of the United States; duties were prescribed for district attorneys; and after declaring it to be an offense against the United States for any one by unlawful means to induce an officer of election to violate or refuse to comply with his duty under any law regulating the election, Congress adds, out of abundant caution, "or aids, counsels, procures, or advises any such voter, person, or officer to do any act hereby made a crime," etc.

Counsel in the consideration of this question pressed upon me with great force and earnestness what they called a fundamental rule of construction; that is, that the penal laws are to be considered strictly, and that therefore I departed from that rule, recognized in both the Federal and State courts, when I gave this broad construction to the word "hereby" in section 5511. They announced that they were willing to risk this case so far as that rule was concerned upon the language of Chief-Justice Marshall in Wiltberger, 5th Wheaton. That case is not unfamiliar to me. I had occasion to refer to it on the former hearing. And it seems to me that counsel did not quote the whole of that opinion when they say Chief-Justice Marshall, of the Supreme Court of the United States, says that penal laws are to be construed strictly. That is not all. Chief-Justice Marshall said: "That though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation or in that sense in which the legislature has obviously used them, would comprehend." So, in the case of The United States *vs.* Meyers, one of the cases referred to in argument, Chief-Justice Taney used substantially the same language, expressing the same idea in expounding a penal statute. He said: "The court certainly will not extend it beyond the plain meaning of its words, for it has been long and well settled that such

statutes must be construed strictly; yet the plain intention of the legislature ought not to be defeated by a forced and overstrict construction."

In short, the rule substantially is that a court is not to resort to devices or tricks of words in order to convict a man of crime whose offense was not within the minds of the legislature; nor is it to resort to tricks or devices to defeat the manifest will of the legislative power. The court must act upon the principles of common sense; that is the meaning of the rule. And so guided, looking at that section 5511, it seems to me that I would be trifling with the will of Congress, which has power in this matter, if I were to consider that statute with the strictness insisted upon in the argument by counsel for the prisoners. It has been said further, as against this conclusion, that if that construction be proper there was no necessity for section 5515, nor was there any necessity for the section 5511, and therefore we put Congress in the position of making provision for the same class of cases twice over in the statute. I know of no decision of any court in this country which would authorize me to defeat the will of that act of Congress because Congress had in the same act made double provision for the same offense. If because of the carelessness of the man who drew the act, or from haste in the proceedings of Congress, it so turned out that the same crime is defined in two different sections of the same statutes or act with the same punishment to be fixed, we are not for that reason to depart from ordinary rules of construction nor to defeat the will of Congress.

I am of the opinion also, though I need not stop to discuss the question fully, that this case, as charged in the indictment, is covered by the last clause of section 5512. Without going fully over that ground, which is entirely familiar to counsel, and perhaps may not be very material in view of what I have said, I will simply call their attention again to the fact that section 20 of the act of 1870 —and that is section 5512 of the Revised Statutes—origi-

nally referred to the registration of voters simply; but at the same session of Congress, or the succeeding session and in the same volume, we find an act of Congress which amends that original section and puts it substantially in the form in which section 5512 now is. Section 5512, as it originally stood as section 20 of the act of 1870, had no reference whatever to elections, yet by the amendment of 1871 Congress does introduce the element of elections; and the closing part of the section is in these words:

"Or if any such officer, or other person who has any duties to perform in relation to such registration or election, in ascertaining, announcing, or declaring the result thereof, or in giving or making any certificate, document, or evidence in relation thereto, knowingly neglects or refuses to perform any duty required by law, or violates any duty imposed by law, or does any act unauthorized by law relating to or affecting such registration or election or the result thereof, or any certificate, document, or evidence in relation thereto, or if any person aids, counsels, procures, or advises any such voter, person, or officer to do any act hereby made a crime, or to omit any act the omission of which is hereby made a crime, every such person shall be punishable as prescribed in the preceding section."

So that, if I am wrong in construing the word "hereby" in section 5511 as embracing the whole of that chapter, and if the strict construction of that word, insisted on by counsel for the prisoners, is the true one, I do not see any solid ground upon which they can escape the language of section 5512. Because that section does make it a crime, in terms, for an officer of an election for Representative or Delegate in Congress to omit to perform any duty required of him by law, or to violate any duty imposed upon him by law, or to do any act unauthorized by law in relation to such elections, and follows it with the declaration that any person who does counsel, procure, or advise any such officer to do any act thereby made a crime is liable to this punishment. Therefore, in any view of the

case, whether upon the single ground upon which it was placed in the opinion which I delivered in Coy's case, or upon the additional ground now stated, there is an offense described in this indictment against the United States.

This brings us to inquire in respect to the law of the State of Indiana. Each one of these sections, when it uses the phrase, "Duty under any law regulating the election," refers, of course, to a duty prescribed by the law of the State in which the election is held. And, whether construing the one section or the other, we are entitled to and must look at the statutes of the State of Indiana. The United States says, in substance, whatever is your duty as prescribed by the law of the State of Indiana, with reference to an election of a Representative in Congress, we make that your duty to us, and a violation of that duty is an offense against the United States. Was there any duty upon these inspectors, in reference to these papers, imposed by statute? If there was not, then there would be an end to this case. On the question of jurisdiction, the court would be bound to say, on the face of this indictment, an offense is described which is not an offense against the United States. Section 4712 of the present revision of the statutes of Indiana says:

"When the votes shall be counted the board of judges shall make out a certificate, under their hands, stating the number of votes each person has received, and designating the office, which number shall be written in words, and such certificate, together with one of the lists of voters and one of the tally-papers, shall be deposited with the inspector, or with one of the judges selected by the board of judges."

We have, then, the plain declaration in this statute of Indiana that this certificate, together with one of the lists of voters and one of the tally-papers, shall be deposited with the inspector, or with one of the judges selected by the board of judges. What, then, becomes of the other papers? The next section, in substance, requires that

they be sealed up in a strong paper bag, and as soon as possible, on or before the next Thursday, be delivered into the custody of the county clerk, strict care being taken at every step to preserve them against being tampered with.

Now what are the board of inspectors to do when they meet? "The inspector of each township or precinct, or the judge of election, to whom the certificate, poll-book, and tally-papers shall have been delivered, as provided for in this act, shall constitute a board of canvassers, who shall canvass and estimate the certificates, poll-lists, and tally-papers returned by each member of said board, for which purpose they shall assemble at the court-house on Thursday next succeeding such election," between certain hours. We have then the clear statutory declaration, that when the votes are counted and the certificate is made out, that that certificate, with one of the poll-lists and one of the tally-papers, shall be deposited with the inspector. We further find, from the last section that I have read, that when the inspectors meet, the inspectors of each township, precinct, or the judges of election to whom the certificate, poll-book, and tally-papers shall have been delivered, as provided in this act, shall constitute a board of canvassers. This law is not to be frittered away, to use the language of Chief-Justice Marshall, by an overstrict construction. When we look at the extreme care which is taken by this act—and it is one of the best of which I have any knowledge, and if honestly performed it will always guard the ballot-box against fraud—when we look at the extreme care taken to guard these certificates, and poll-lists, and tally-papers, and ballots, the latter being put in a sealed bag, I am prepared to repeat what I said on the former hearing, that, as plain as words can do so, when the legislature directed that those papers, which are called the outside papers, shall be deposited with the inspector, and that the board of canvassers shall make that canvass upon the papers which shall be delivered by these inspectors to the board of canvassers, it imposes as plain a

duty, it seems to me, as if I were to say that two and two make four. It would be difficult to make it plainer. And for me, sitting for the purpose simply of interpreting the law, if I were to hold that an inspector of an election was under no duty as the depository of those papers to hold them and guard them with the same diligence that any man should guard a thing that was deposited with him, the diligence to be measured and determined in each case by the value of the thing deposited with him—if I were to hold that that inspector could leave these papers carelessly at this house, or that house, or the other house, or with Dick, Tom, and Harry, between the hours when he received them and the time when the board of canvassers was to meet, it seems to me that I would be trifling with plain, simple words, almost too plain to need construction. Therefore, I am bound to hold, as I held last summer in the Coy case, that these statutes do impose upon these officers the duty of safely guarding those papers while in their hands.

In this connection, although it is a little out of order—out of the order in which the objections are made—I will refer to those sections of the statute which relate to the sealed bags. The district judge, on the trial of this case, told the jury as matter of law that the inspectors, when they met and organized as the board of canvassers, had the right to send to the clerk and get the sealed bags if it became necessary in order to ascertain the result of the election, and in so ruling it is argued by counsel that the district judge went counter to what I said in the opinion in Coy's case. In this counsel are mistaken. I had no occasion, under that indictment or in that case, to pass upon that question, nor did I pass upon it. Surely I did not intend to pass upon it. Referring to the papers deposited with inspectors I did use this language: I said these were important papers because upon examination of the statutes and the decisions of the Indiana supreme court it will be found that, although in contested election cases

the ballots, lists of voters, and tally-papers sealed up and delivered to the county clerk are primary and conclusive evidence of the result of the election, the papers deposited with the inspector constituted the basis upon which rests the official declaration in the first instance of the result of the election in the State. I was in that connection emphasizing what the legislature had made the duty of the inspector by showing what, under the decisions in this State, was the importance belonging to those papers; that these outside papers, as they are called, are the papers which in the first instance is the basis of the official declaration of the result of the elections. So the supreme court held in 59th Indiana; so doubtless they would hold now in a similar case; and that the papers in a sealed bag were primary and conclusive evidence of the result of the election, and so they might become. But I made no declaration in that case as to the authority of the inspectors to send for the sealed bags while they were making the canvass. Upon an examination of that question I am of opinion that the district judge did not misconstrue the law upon that point, and that his interpretation of the law was correct. It seems to me it is made almost self-evident, when you come to review the history of those statutes, which I have done upon this hearing. In looking at the revision of 1876 upon the subject of elections it will be found that when the case in 59th Indiana and the case in 61st Indiana were decided there was no such language in the election law as was placed there in 1881. There was nothing in the law prior to 1881 that indicated that the inspector might, under any circumstances, send for the sealed bag and open it for any purpose. But in 1881 that law was altered so as to require that the second set of papers be put in sealed bags, as already stated, and deposited with the clerk instead of being kept in the ballot-boxes by the inspectors as before had been required; and these words were added, which I now read:

"The clerk shall securely keep said envelope so sealed,

with the ballots and papers therein in the same condition as it was received by him from the inspector, in his office (unless opened by said inspector, in the presence of the board of canvassers, as herein provided), for the period of six months."

Just below that is a provision made for the board of canvassers as to what they shall do.

Now why did the legislature in 1881 add the words in reference to the sealed bags, "unless opened by said inspector in the presence of the board of canvassers as herein provided," unless the legislature intended to recognize that there might be a state of case in which unless that power was intrusted to inspectors the will of the people as expressed at the polls might be defeated, and a party driven to a long and tedious contest in order to obtain his right—and there is no better illustration than is afforded in this case. I do not say this case, only as it is developed in this large record and what there appears—and I did not understand upon the argument that the fact was contested by anybody that some of these papers, the outside papers, were in fact altered by somebody, and altered after they were made out. When these papers came before the board of canvassers it was plainly to be seen that somebody had tampered with them since they were made. The legislature no doubt put that provision in the act of 1881, and keeps it there now, because it did not intend to impose upon the board of canvassers the necessity of making a certificate of the result of an election based upon papers which they saw upon their face were forged or mutilated. They intended to give inspectors the power in that state of case or any proper case, in order to ascertain the real will of the people as expressed at the polls, to send to the clerk. And in so sending no harm could come to anybody. There is the clerk, the custodian of the sealed bag. There are a large number of inspectors constituting the board of canvassers, representatives of both political parties, and no harm can come to anybody

if that sealed bag is opened in the presence of these representatives of all political parties and the clerk and officer who is the custodian of them ; and that was the only place in which they could be opened except in a contested election ; they could then be brought into court. Now, by section 4720—

"No tally-paper, poll-book, or certificate returned from any election by the board of judges thereof shall be rejected for want of form nor for lack of being strictly in accordance with the directions herein contained, if the same can be satisfactorily understood."

And this was added in 1881 :

"And such board of canvassers shall in no case reject the returns from any precinct if the same be certified by the board of election of that precinct as required by law, and presented to them by the inspector or one of the judges of the board."

It is idle to say that the board of canvassers having a certificate before them and being perfectly satisfied, upon the face of it or otherwise, that that certificate has been tampered with by somebody, it is idle to say that they are bound to take that certificate as the certificate required by law. It is not the certificate required by law ; but it is one not required by law, as it has been changed by somebody. The power belongs to the board of canvassers to send for the sealed bag to see exactly what the truth is, and find out what the ballots establish, what the people have said at the polls, and give effect to that result.

A good deal more might be said upon that subject, but there must be an end sometime or other, and I leave that question and that part of the case with the declaration that in my judgment there is upon the face of this indictment an offense against the United States ; that it is aptly defined in the indictment; that as defined it is an offense against the United States which it was in the power of Congress to declare, and that it is an immaterial circumstance on the face of this indictment what was the

nature of the alteration made. A good deal was said in argument as to the singularity of the state of case that a court of the United States was asked to sit in judgment upon the alteration of an election paper which confessedly had no relation to a member of Congress. It seems to me sufficient effect is not given to the fact that it would be very inconvenient for the people of any State if Congress were to take complete control of the election for Congress, and have it at a different time and at a different place from the election held for officers of the State. We have a great many elections now, probably more than we ought to have. At any rate Congress leaves the election for Congressmen to take place at the same time that other elections of State and local officers take place. Congress leaves it to the State to provide the mode of conducting that election. Do it under your officers. Make such regulations as you choose. All that we mean to do is to guard an election for Representative or Delegate to Congress, and, as in the case that may occur under the election laws of Indiana, the papers that may be made out contain evidence in reference to an election for member of Congress, as well as for local officers, these papers become the joint property of the United States and of the State. The provisions for the punishment of these crimes that may be committed in reference to the election of a Representative in Congress would amount to very little if a party could break this sealed bag, for instance, which contains the ballots for members of Congress, and thereby acquire an opportunity to destroy the ballots for Congressmen, and then when put upon his trial for breaking this seal in which these two governments have joint interests he could be heard to say, "I did not intend to affect the election of Congressman; the purpose was to do harm to the people in reference to the local election." But I discussed that matter fully in the other case and I will not go further upon it.

I now come to the grounds for new trial in this case.

First, let me say, the power of the court to pass upon questions, when sitting in error, is not as broad as counsel have assumed it to be. The circuit court, in cases of this sort, is sitting in error to pass upon matters of law, not to do what the judge below might have done, if, upon the whole view of the case, he thought that these men ought not to have been convicted; he had the power to set aside the verdict and order a new trial. That power does not belong to a circuit court when sitting as a court of error to review the action below. Its function is limited to the consideration of questions of law. But I am not disposed, as there is no appeal from the conclusions that I reach in this case, no writ of error to the Supreme Court of the United States, to be very technical, and have come to the conclusion that I would consider these questions in the form they are raised. What are the grounds for a new trial?

The first three grounds may be considered together, and what do they amount to? They amount to this: That the judge should supervise the action of the jury. The verdict can not be said, in this case, to be unsupported by sufficient evidence. There was evidence to go to the jury, there was a good deal of evidence to go to the jury—perhaps a good deal went to the jury, out of the liberality of the counsel on either side, that might technically have been excluded—a good deal, however, of an immaterial character that does not affect the substance of the verdict. I will not take the time of the bar, that are perfectly familiar with this case, in going over this evidence from beginning to end. As to these three grounds assigned for a new trial, I will only say that the verdict is, in my judgment, supported by the evidence; I will not say how strongly, I do not care to do that; but I do mean to say that so far as the evidence is concerned, it was a case which the judge ought to have submitted to the jury, and the jury having found the verdict which they did, a judge would be interfering with the functions of a jury if he

were to set aside the verdict upon any view that he might take of the evidence.

The fourth ground is because of error of law occurring at the trial in this, to wit: In the giving by the court to the jury of its own motion the general instructions given; to the giving of which instructions, and each part thereof, the defendants and each of them at the time excepted. I do not know but that I am departing from the settled rules of practice in the Federal courts, if I were to consider the exceptions to the charge of a court as worth anything. His honor the district judge delivered a long, full charge. I judge from the print it must have taken two hours to deliver it, and when it is concluded this is the exception:

"To which ruling and action of the court in giving to the said jury said charge and instructions, and to the giving each and singular, every part, parcel, and proposition, in said charge and instructions contained, the said defendants, the said Coy and the said Bernhamer, each and severally, at the time excepted."

And that is the whole of this exception. In other words, an exception that means no more in point of law under the established rules of practice than if the defendant had said, "I except to the charge of the court"; but that is no exception for the court of error to consider. The judge of the trial court has a right to have a specific exception. If he has committed an error in anything that he has said to the jury, he is entitled to have his attention pointedly drawn to the very exception, so that he may then and there correct it. And our reports are full of cases without number to the effect that a charge in the circuit court to which no other exception is made than a general one, that the party excepts to the charge, will not be examined by a court of error. But taking the exception to be a good one, for the reason that I have just stated, that there is no writ of error from any conclusion that I may have reached here, is there anything in the charge that is objectionable?

I have read it and re-read it carefully. Counsel said with much earnestness that the animus of the charge was wrong. He referred to various parts of the charge in which the judge expressed his opinions on the facts. That criticism is a very natural one, a very natural one for me to hear, because in the State in which I practiced before I went upon the bench, and probably in most of the Southern and Western States, the judge is not allowed to open his mouth to the jury in criminal cases except in writing. He can not charge the jury on the facts. He can not aid the jury by a discussion of the facts. But that never has been the rule in the courts of the United States. In the case to which I called the attention of counsel on the hearing, a very recent case, followed by two cases since, which I do not happen to have just at this time, this was the language used:

"In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, can not be reviewed on writ of error."

In other words, the rule, as the courts of the United States have maintained ever since the organization of our Government, is that the judge may call the attention of the jury to the facts, and may indicate his opinion upon the facts, provided he leaves to the jury the determination of the facts, and provided he distinctly tells them that the responsibility is upon them for what conclusion the facts may justify. I have gone carefully over this charge from beginning to end, and I am bound to say that the district judge has taken extraordinary pains to tell the

jury, I think, in every single instance in this charge where he would express or intimate the view he took of the facts, that they must decide what the facts were upon the point. One or two parts of the charge of that character I will refer to:

"Now, then, it is upon that charge that you are called to investigate the evidence and determine whether these defendants are guilty or not guilty. These defendants, as in the case of every one arraigned for criminal offense, are presumed to be innocent until they are proven guilty. That presumption goes with them until it is overcome and blotted out by the evidence, and you are not permitted to find them guilty—it is not permitted in any case to find one accused of crime guilty—until the evidence establishes his guilt beyond a reasonable doubt.

"The jury will look into all these questions and determine whether the man's character is entitled to weight in making up their minds about the fact ultimately to be determined of guilt or innocence.

"I do not understand the evidence, although, of course, I leave that as a question of fact for you.

"It is the duty of such board in such case to reach an honest result, and to use the means before it to accomplish that end."

And in that connection he distinctly says to the jury:

"Whether Mr. Bernhamer, upon that occasion, was acting in good faith, whether, in the rulings that he gave, he was acting under a mere pretense, or was giving his honest judgment of parliamentary or statutory law, it is for the jury to say.

"I shall now proceed, gentlemen, to say some things about the evidence in this case, but remind you of what I said before, that what I say is not binding upon your consciences except so far as it commends itself to your judgment. You are ultimately the judges of all questions of fact, the credibility of witnesses, and the inferences to be drawn from the testimony, and anything that the court

says is only for the purpose of aiding you in considering the testimony, leaving the ultimate responsibility with you."

After he had repeated statements of that character over and over again in the charge, he concludes:

"Gentlemen: I think I will pass no further review upon the testimony of this case. I have gone through this more for the purpose of showing you how to take hold of these questions. I have indicated my own views, but they are not to be binding upon you at all, unless they conform to your reason and judgment when you have surveyed the whole field."

Nothing could be more explicit than this. The trial judge seems to have been scrupulously careful from the beginning to the end of that charge. While doing as he had the right to do, according to the practice prevailing in the courts of the United States, and which many think the best practice, to express his opinion, if he does, about the weight of evidence upon a single point, in every single instance he cautions the jury, "You are not to be influenced by this; the responsibility is upon you to determine the facts; I have a right to determine the law and you the facts, and I put the responsibility upon you under your oaths and according to your consciences to say what the facts are."

It was said in the argument, and it is stated, as the fifth error or cause for new trial, in effect that the court erred in admitting evidence of changes and erasures upon tally-sheets before proof had been made of the alleged conspiracy.

I cannot understand why that evidence was not competent. If the objection be that it was offered at the wrong time, and that there should have been fuller evidence before it was offered of the fact of a conspiracy, that is not a very material circumstance, at least not a vital one. It is a matter of discretion with the court as to the order of proof. It would be a very serious affair, indeed, in the administration of justice, if the court of

error were to attempt to interfere with the discretion of the trial judge, who sees the jury and the parties and the witnesses, and has before him a picture of the case from the beginning to the end. It would be a very serious matter to interfere with him in his discretion as to the order in which proof should be offered. But apart from the question of order, it seems to me that that evidence was clearly competent; competent in matter, and certainly competent for the purpose of proving, in addition to the conspiracy, that acts had been performed and done in the execution of the conspiracy.

I pass those now to other grounds. The sixth, seventh, and eighth grounds may be considered together.

All these three grounds of error relate to the same point. In substance it is this: That Messick received this telegram before the jury returned the verdict: "Your mother is dead. Come as soon as you can." And he was permitted by the court to send this answer to his friend: "I will try to get there on No. 3 to-night. Send word to my folks."

There are affidavits here offered for the purpose of showing that state of case in Mr. Messick's domestic affairs was used for the purpose of bringing about a verdict of guilty when one would not otherwise have been obtained. We have the affidavits of John J. Cooper, who states a conversation he had with Carbonier and Peters the day after the verdict, the affidavit of Riley upon the same point, the affidavit of Mr. Buskirk as to a conversation with Carbonier, the affidavit of Mr. Johnson as to the same, the affidavit of Mr. Miner as to a conversation with Peters, the affidavit of Cooper as to a conversation with Carbonier, and the affidavit of Stokes as to a conversation with Messick. All of these affidavits, other than Mr. Stokes's, purport to state what these witnesses heard two of the jurymen say on the day succeeding the trial, which statements of those two jurymen, if they made them, were not

under oath. It seems to me extraordinary, indeed, if a verdict in a criminal court is to be set aside by affidavits of people as to what A, B, C, and D, who were on the jury, may have said to somebody else in their presence, and when they were not under oath. I think that I may pass that part of the evidence without any comment. If the court ought to set aside a verdict in criminal cases for such reasons, very few verdicts could stand either in the Federal or the State courts. The affidavit of Mr. Stokes is directed to a conversation with Mr. Messick himself. He talks with the juror as to the effect of that telegram. Now if these affidavits are admissible at all as evidence, there are counter-affidavits very clear and explicit from Mr. Davis, the foreman of the jury, and Mr. Messick himself. There is no ground I think upon such of the affidavits as may be fairly considered as evidence that would take the case out of this rule as laid down in Archibald on Criminal Cases; or the rule extracted from cases laid down in Waterman on New Trials, that "however improper the conduct of a juror may have been, yet if it does not appear that it was occasioned by the prevailing party, or any one in his behalf, if he did not intend any improper bias upon the juror's mind, the court can not say that it either had or may have been affected unfavorably to the party asking for a new trial, and the verdict ought not to be set aside."

I think it would have been very extraordinary if the court had not allowed that information to go to the juror. I think I should have done so if I had presided at the trial, and I think I should have allowed him to send the answer. And so far from the argument being a sound one, that a man receiving a message of that sort is deprived of that power to deliberate and think that makes a competent juror in cases of this kind, I should say, judging by my own observation of the human family, that if that telegram gave him distress, as of course it did, it put him in a frame of mind to feel very kindly rather than harshly toward the defendants. But apart from any mere

speculation upon the subject there is nothing in evidence, so far as it is competent, that ought to induce the conclusion that the receipt of that telegram influenced in the slightest degree the verdict of the jury.

I come now to ground marked eight and a half, which relates to the misconduct of certain jurors, the names of whom are unknown, but the facts in relation to whom are set forth in the affidavits filed herewith of William F. Martin and Fred Mitchell, wherein it is alleged and is now here charged that the said jurors, after the cause was submitted to them, partook, without the leave of the court, of spirituous liquors. The affidavits of Martin and Mitchell upon that subject are substantially the same, except that they prove different drinks. Martin's affidavit is to the effect that he is head waiter in the Grand Hotel in the city of Indianapolis, and the jurors in the above-entitled case took their meals in what is known as the ordinary in said hotel, from supper on Friday night, January 29, to supper on Saturday night, January 30, inclusive, and that when the jurors occupied the ordinary no other guests were allowed therein, etc. These affidavits describe two different occasions. It seems from reading them that they exclude the idea that any outsider was tampering with the jury either on the part of the Government or on the part of anybody else or on the part of the defendant; that the whisky was taken by these jurors in the presence of the other jurors, so that the proposition which is made by counsel for the defendants is that without any inquiry as to the effect of this liquor upon the mind of the juror who took it, although it might not have affected him, still that the mere taking of a drink of whisky by a juror in the presence of the bailiff and of his fellow jurors constitutes sufficient reason for setting aside the verdict. They refer us upon that subject to decisions by the State of Indiana. The first case upon that subject is Creek against the State in 24th Indiana, which hardly sustains that view. While the jury were deliberating upon a verdict in that case some

of its members, without leave of the court or the knowledge or consent of the defendant, and without being attended by an officer of the court, separated from their fellows and went where there were other persons and drank whisky. That is a very strong case of misconduct on the part of the jury. It was shown by affidavits that they did not drink to intoxication, and that the influence of the liquor was not perceptible upon them, and that during such absence they were in no respect attempted to be tampered with. That case is hardly sufficient to sustain the view which counsel take. Probably the strongest case in the mere words of the court which they present is the case in 35th Indiana, of Davis against the State. And that was a somewhat different case. After the jury were charged and put in the care of the bailiff, the bailiff with two of them went to a liquor and billiard saloon where other persons were drinking and playing billiards, and the bailiff procured for each one of them brandy, etc., which was paid for by one of them. The evidence does not show where the other jurors were at the time when the two with the bailiff were in the saloon. There was no attempt to show that the jurors were really suffering with the disease of which they complained, or how much liquor they drank or what effect it had upon their fitness to deliberate upon the case, or in any other way to break the force of the showing made by the defendant, and the court in this case held that according to the authorities, such misbehavior unexplained was sufficient to set aside the verdict, and the authorities are abundant and satisfactory.

Now you observe there was drinking away from the balance of the jury, in the presence of others, without any proof as to where the other jurors were.

I am not prepared to say that that ruling upon the facts of that case was wrong. But in the 56th Indiana there is the case of *Pratt* v. *The State*, in which the facts are thus stated by the court: The trial of the case occupied a week; during the portion of it occupied in hearing the

evidence and argument in the case the jury was permitted to separate during the adjournments of court. It is established by affidavit read on the hearing of motion for new trial that one of the jurors during one or two of the adjournments drank a glass of whisky of his own motion and at his own expense. No one interested in the trial was in any way instrumental in furnishing the liquor, or associated with him in drinking.

But it is conclusively shown, by the affidavits, that the juror was perfectly sober and strictly attentive to the discharge of his duties as a juror, from the commencement to the end of the trial. The court held this was not sufficient cause for a new trial.

In a later case of the supreme court of Indiana—it is true it is a civil case, but in questions of this sort I do not know that the rule should be different—in support of this reason affidavits and counter affidavits were filed by which it appears that some of the jurors understood that when the court finished its charge to them it gave them a short recess, as it had frequently done before during the progress of the trial. Under this impression two of them went down stairs to the back door of the court-house and immediately returned; said nothing to any person and no person said anything to them. One of the jurors went out of the court-house and went to a saloon and drank a glass of beer; while there was asked what was his hurry. He answered that he was on the jury and had to hurry back, and immediately returned to the jury-room, which was all that was said by or to him, or done by him while absent. The jurors were all in the jury-room and in charge of the bailiff within four minutes after the court had finished its charge to them, where they remained in charge of the bailiff until the verdict was completed. The evidence shows that no attempt was made by any person to tamper with either of the jurors while absent, and that the one who had taken a glass of beer was not perceivably intoxicated thereby, nor in the least disqualified from discharg-

ing his duties as a juror in the case, and the verdict was not set aside. That is the latest case in the supreme court of Indiana to which my attention has been called. These are the decisions in this State, and they are perhaps more liberal to the accused in this State than they are in many other States—certainly more liberal than in the courts of the United States.

The rule as established in the courts of Indiana is in substance this, as I understand it: While the fact that a juror drinks while he is in charge of a case is a circumstance that ought to attract the attention of the court, because the court knows, as everybody else knows, that some persons are easily influenced by ardent spirits—more easily influenced than others—while it is a circumstance suggestive to the court to be watchful and, indeed, suspicious as to whether the rights of the defendant may not have been influenced or injured by conduct of that sort, yet, when it appears upon a fuller view of the facts legitimately brought before the court that the verdict was not influenced thereby the court will not set aside the verdict of guilty; and no other rule is a safe one. The evidence in this case shows that when this whisky was taken it was taken under circumstances that might ordinarily occur in any assembly of men, whether jurors or other; taken in the presence of a bailiff, in the presence of all the jurors, with no outside persons present, and at the suggestion of the juror himself; and we have the affidavit in this case of the foreman of the jury, and I think another juror, to the fact that no one of these jurors was under the influence of ardent spirits. I think, therefore, there is no ground in this matter for the new trial.

The only question remaining which I deem it necessary to consider is the claim on the part of Mr. Bernhamer that he has been once in jeopardy; and that defense is founded on what he says occurred on the trial of the case of the United States against Coy and others for substantially the same offense as is described in this indictment. This de-

fense is presented in a very curious way. I had always supposed that a defense that a party had been once in jeopardy should be presented by a plea setting out all the facts, but counsel informed me that according to the practice in Indiana, which perhaps may be properly recognized by the Federal court, evidence on this subject may be given under the general plea of not guilty; so that if the question is properly here, is the evidence sufficient to sustain the defense? What is the record in this case, and what is it that Mr. Bernhamer claims upon that point? He says that at the former trial the jury came in, and the court, in his absence, and when he was not present, even by counsel, discharged the jury, and that that discharge of the jury, although they had been together since an hour on the day previous, and reported that they could not agree, was unauthorized by law, as he did not consent and was not present. Whether or not he was present at that trial may be determined in various ways. It may be determined by the presentation of the record in that case, and possibly that record may be contradicted by parole testimony; but the record of that case is not in this case. How that question was to be raised in any form to be of any service whatever to Mr. Bernhamer, without the production of the record in that case—assuming that he need not make a special plea and that he could have proven the facts upon which he relies by parole before the jury in this case—he could not get along at all in the matter without the production of the record of that case. He did not offer the record of that case in evidence in this case. He did not even offer the indictment as evidence in this case. On the contrary, when the Government itself offered the record as evidence in the case, he objected to its being introduced, and the court sustained the objection; so that in this case we have nothing to show what occurred when the jury was discharged in the other case, except his testimony. That could not be permitted to defeat the prosecution of this case.

He can not raise the question in any form except by plea, or if he did not rely upon any other plea than not guilty, except by production of the record and then his oral testimony contradicting that record if he claimed that it was not true. So far as we may know upon that subject by the paper, the circuit court—for that is the court that I am holding now—is advised by a bill of exceptions that in a motion made in case 3665, I believe that is the number, to correct the record in that case, his honor, the district judge, has made a finding upon the evidence that it is not satisfactory, and therefore the record stands as it was entered; but what is the record, as we may see from that bill of exceptions, if we are to consider the question at all? Why, the record recites that he was present in person and by counsel, and so far as the question of presence is concerned, in considering the matters put before the court in this case, on the writ of error, I must take the record in that case as the fullest and best evidence upon the subject; and that leaves under the issue of once in jeopardy only the question whether or not Judge Woods had power to discharge that jury without the consent of Mr. Bernhamer. And I confess that when the question was raised by counsel I was somewhat surprised that the proposition could be maintained that the judge could not discharge a jury in a criminal case after they had been held twenty-four hours, and after he had come to the conclusion that there was no longer any need of keeping them together. There are some authorities in this State that apparently, unless they are carefully examined, seem to maintain the view of counsel, but when carefully examined they do not sustain him. In 5th Indiana, in the case of Wright *vs.* the State, the head note is:

"Where a prisoner has been given in charge, on a legal indictment, to a regular jury, and the jury has been unnecessarily discharged, he has been once put in jeopardy, and the discharge of the jury is equivalent to a verdict of acquittal."

But what was the fact in that case? It was an indictment for murder. The defendant pleaded not guilty, and the jury was impaneled, and the trial progressed until the succeeding Saturday, when the court, being satisfied that the trial could not be closed on that day, discharged the jury, notwithstanding the objections of the prisoner, who insisted that the trial should proceed to its conclusion. The supreme court of the State, upon a review of the authorities, expressing their concurrence with some and their non-concurrence with others, said that the court below erred in supposing that the trial could not be extended into the following week; that the law was plain that it could have been continued into the following week, notwithstanding there was a term of the same circuit court in another county to commence on the following Monday; and so therefore the case presented is one of a judge discharging the jury in violation of law, or rather under mistaken view of the law, after a man had been put upon trial for his life, when the court could have proceeded with the trial. The supreme court of Indiana say that that man had been once in jeopardy, and that was equivalent to an acquittal. Now what is the other case? There was a case in 8th Indiana which differed from this in a very material respect. The head-note is:

"The jeopardy in which a person can not be twice put for the same offense has been once incurred by the prisoner when he has been given in charge on a legal indictment, to a competent jury, which has been unnecessarily discharged. The court has no discretionary power to discharge the jury to whom the cause of the prisoner has been submitted. Such a discharge must result from a necessity determined by law, or it will release the prisoner. The fact that the jury, after twelve hours' consultation, report that they can not agree does not constitute such a necessity. A cause which has not progressed to final judgment is not appealable to this court."

The difference between that case and this is, that the

prisoner was in jail and not consulted about it, uninformed about it. His being consulted about it would not be very material in the view which I take of it, but he was in jail, indicted for grand larceny, and while the Government was holding him in jail the jury was brought in and discharged after twelve hours' consultation. The court held that that was once in jeopardy. I ought not, perhaps, to give this case as much consequence as the high character of that court entitles its judgment to receive, because it is stated on the face of the opinion of Judge Perkins that the case not having been brought to final judgment was not appealable, "but as we have no doubt upon the point of law involved, and much future trouble, and perhaps hardship, in the cause will be saved by its decision, we proceed to make it;" that is to say, the court proceeds to give its opinion in a case which was not before it, because there had been no final judgment in the court below. But I do not mean to express any dissent to this case upon which counsel mostly rely. In respect to *State* vs. *Wilson* (55 Ind.), all I want to say is, that the prisoner, who was indicted for murder, and was in jail at the time the jury was brought in, and in his absence discharged, there is no case to which we have been referred that meets the facts of this case, where the defendant says that he himself is a lawyer; that he was represented only by himself; was present during the trial, and participated in the trial; could go and come from the court-house as he saw proper; was under no restraint on the part of the United States during the trial; was out of the court-house voluntarily. I say there is no case in Indiana in which it has been held that a defendant so situated can plead once in jeopardy because the court discharged the jury upon its own motion, its own responsibility, and under the circumstances presented to its mind; but if the decisions of the supreme court of Indiana were as strong as counsel take them to be I should feel myself bound to follow the decision of the Supreme Court of the United States.

I refer to the case of *The United States* vs. *Jos. Wheeler*, in 9th Wheaton, opinion delivered by Justice Storey. This was a capital case.

Why, it would seem to put in peril the proper administration of justice, both for the Government and the State and for the citizen, if any other rule were to obtain. Suppose that a juror in a criminal case becomes insane, if you choose; it becomes a doubtful question whether he is capable of going on. Is the defendant once in jeopardy because the judge, looking at all the circumstances of the case, says that this trial ought not to proceed further, and for that reason discharges the jury—has the man been once in jeopardy? Many other circumstances might be supposed—many other states of case. It would be unfortunate, indeed, if the court had not the power in the exercise of its sound discretion to discharge the jury without enabling the defendant to say he has been once in jeopardy. I do not mean to say there are any authorities to the effect that this is an absolute power. If, ten minutes after the jury retire with a case that involved the liberty and life of a citizen, the judge should call them into court and say, "Have you agreed?" "No; we have not agreed yet." "Well, I discharge you from the further consideration of this case." Such a case, upon the face of it, would strike everybody as a monstrous exercise of discretionary power upon the part of the court; and, I suppose, any court, State or Federal, would hold that that man was once in jeopardy. The discharge of the jury under such circumstances was practically an acquittal, and he would be protected from further prosecution. The law is reasonable, and therefore it is a reasonable rule when applied to a case of this kind, where a jury have been out, according to the evidence, about twenty-four hours, and reported to the court that they were unable to agree—it may be that the court knew personally some of the jurors, and if he did not know them personally he knew them by reputation; he may be able to see from the circumstances, from the character of the re-

port made to him, that there was no use keeping this jury here, that they will not agree—I am therefore bound to say, under this evidence, that the exercise of discretion on the part of the court seemed to be reasonable—that there is no just ground to say that any injury was done to the defendant, and the discharge of the jury does not enable him, under the circumstances deposed, to say that he was once in jeopardy.

I believe that this covers all that is material in the case; at any rate, it covers all that it seems to me material to consider.

I feel very much indebted to counsel in the case on both sides for the argument which they made. It was characterized by zeal and by very thorough preparation of the points in the case. I do not know that I should have been able, in the short time that I had, to go through the record if I had not had the benefit of the argument of counsel.

Very strong appeals were made to the sympathy of the court in behalf of these defendants. Perhaps it might not be improper to say that, while it is perfectly natural that counsel feel that way, and they are in the line of their duty when they press considerations of that sort upon the court, I am sure that neither the district judge nor myself take any pleasure in proceeding in a case involving the liberty of anybody. I know I do not, and I think I can say that for him. And while counsel are in line of duty in pressing considerations of that sort upon the court, the courts have also duties to perform, and if we were to permit considerations of that sort to influence our interpretation of the statute we would violate our oaths of office, and perhaps would be as criminal, or would be committing against public justice crimes a great deal higher than those of which these defendants are convicted. We have nothing to do except walk in the plain path of duty, and to construe the statutes in the light of our consciences; and so acting and so feeling, my conclusion upon the whole case is that there was no error committed by the district judge

in the trial below, and that this writ of error must be denied, and the order to that effect will be entered by the clerk upon the order book of the court.

THE CHARGE OF JUDGE WOODS.

Gentlemen of the jury: It is proper in the beginning that I should state to you the relation of judge and jury to each other in this court, as it is somewhat different from what you may have been used to in the State courts. In the State courts jurors are judges both of the law and of the fact, the exclusive judges of all questions of fact, and ultimately have a right to judge of the law in the case. They also fix the punishment if they find a verdict of guilty. In this court the subject of punishment is left to a judge, if a verdict of guilt be returned, within the limits, of course, prescribed by the statute applicable to the particular offense. In this court you are bound by the instructions of the judge in respect to purely law questions; and in respect to questions of fact the judge has more discretion than is accustomed to be exercised, or indeed is permitted to be exercised, by the State judges in the way of advising a jury; though whatever I may say in respect to any question of fact is only advisory and should influence you only so far as it may commend itself to your judgment.

I shall proceed, gentlemen, on the assumption that you remember the oath you took, and that in accordance with that oath your purpose yet is to try the case and to return a verdict according to the law and the evidence; that so far as any outside matters have been referred to you will disregard them; that you will not permit yourself to be influenced by passion or prejudice either for or against these defendants; that you will not return a verdict against anybody because he occupies this or that position, neither

will you return a verdict for him because he occupies this or that position. If I were not satisfied that your minds were in this condition it would of course be a useless thing for me to charge you at all in respect to the case. But I have no doubt you recognize the responsibilities of your position and are inclined to discharge your duty according to your consciences under the law.

Some matters have been referred to in the case that may have some remote bearing upon the consideration of the credibility of witnesses and parties, and the motives under which they have acted, either in giving their testimony or, if they be parties accused in the case, the motives which have governed their action in respect to the matters under consideration. So far as these matters may have any such bearing it is entirely proper that you should consider them and weigh them. But if you go beyond that you will, of course, be going beyond the proper limits of duty. The question to be tried is the question of the guilt or innocence of these defendants, each of them, of a particular charge, the charge embodied in an indictment returned by the grand jury, and to which indictment we must address ourselves in determining the exact inquiry which we have to investigate.

The charge against these defendants is, omitting formalities, that on the 3d day of November, 1886, they, with others named in the indictment, conspired among themselves and with one Samuel E. Perkins to obtain unlawful possession of the tally papers held by certain inspectors of the election in this city and county. Those inspectors are individually named in this indictment as Allen Hisey, Lorenz Schmidt, John H. Counselman, Stephen Mattler, Joel H. Baker, Joseph Becker, Andrew Oehler, and John Edwards. It is charged that, intending to obtain unlawful possession of these papers and to mutilate them, the accused conspired among themselves, and with Perkins, as stated, to induce these inspectors to omit their duty in respect to the papers; that is, to omit

their duty to retain possession of and guard the papers until delivered to the clerk of the county or to the canvassing board. This indictment is founded on certain sections of the laws of the United States and of the State. The United States, being interested in the election of Congressmen, has power, as expressly declared by the Constitution, and in the exercise of that power has seen fit to enact provisions with regard to the Congressional elections. And instead of making special provisions Congress has adopted the laws of the State, and has enacted penalties for their violation as if they were laws enacted by Congress itself.

In this pamphlet I have before me I have a succinct statement of the provisions, both of the laws of Congress and of the State on the subject. The several sections of the laws of Congress are long, and it would be tedious to read them to you, and there are many provisions in them that are inapplicable. I have before me, copied literally, the portions of the statutes which are applicable to the case before us—the portions on which this indictment is based. By section 5515 of the Revised Statutes of the United States, every officer of an election at which any Representative in Congress is voted for, whether appointed under authority of the United States or of any State, "who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State, * * * or who violates any duty so imposed," is declared punishable; and, by section 5511, "if any person * * * interferes in any manner with any officer of such election in the discharge of his duties, or by force, threat, intimidation, bribery, reward, or offer thereof, * * * or other unlawful means, induces any officer of election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document or evidence in relation thereto, to violate or refuse to comply with his duty, or any law regulating the same";

* * * or by section 5512, "If any such officer or other person, who has a duty to perform in relation to such election, * * * knowingly neglects or refuses to perform any duty required by law, or violates any duty imposed by law relating to or affecting such election, or the result thereof, or (affecting) any certificate, document, or evidence in relation thereto, or if any person aids, counsels, procures, or advises any such voter, person, or officer to do any act which is hereby made a crime, or to omit any act the omission of which is hereby made a crime—every such person is hereby made punishable." By section 5520 it is provided: "If two or more persons conspire to commit any offense against the United States, * * * and one or more of such parties do any act to affect the object of such conspiracy, all shall be liable to a penalty." That penalty, while it is not a matter that you are directly concerned in, it is not improper that you should know, may be a fine in any sum not exceeding $10,000, if I recollect correctly, or imprisonment for any period not exceeding three years, or both fine and imprisonment. And, of course, it is within these limits that the court would be bound in fixing punishment if your verdict should call for that action by the court.

It is under this last section, 5520, in regard to conspiracy, that this indictment is brought; and the alleged conspiracy being to commit an offense against the United States, we look to the other sections read to find what particular offense the conspiracy was designed to accomplish. The offense defined in these other sections which I read, preceding section 5520 in the order of reading, is that of inducing, counseling, aiding, or procuring an election officer to omit his duty. The particular omission charged in this indictment, or the particular crime which these parties are charged with having conspired to commit, was to induce these inspectors, namely, Hisey and others, to omit their duty in respect to the custody of their tally-papers and other election returns. The terms of the indictment in-

clude both the sealed bags and what have been called the outside papers. Of course it is patent to you that the evidence in the case mainly at least concerns the action of these parties in respect to the last-named papers.

Repeating, then, and summarizing, the indictment charges that these defendants conspired to induce the inspectors named unlawfully to surrender their papers, the ultimate object being to mutilate and change them. In what respect the intention was to mutilate the papers the indictment does not charge, nor was it necessary that it should so charge. The gist of the offense charged here is not the mutilation of the papers. The offense would have been complete, if it was committed at all, of course, if no mutilation had taken place, or might have been complete. Indeed it was not necessary, in order to the commission of the offense charged here, that any inspector should have surrendered one of his papers; the charge against these men is that they conspired for the purpose of inducing the inspector to surrender his papers, and that certain acts were done in order to accomplish that purpose. It was not necessary, in order that the offense be complete, that the purpose should actually have been accomplished. It was only necessary that some step be taken by one or more of the conspirators for the purpose of effecting the object; whether successfully taken would be immaterial, only as it might be material as matter of evidence in the case. And right here I might say that the evidence in the case has turned mainly upon the mutilations, because when you settle—if you are able upon the evidence to settle—who were concerned in the mutilation of these papers, then, of course, you know who were concerned in getting the inspectors to surrender them. The crime was complete before the mutilation, but you might find the most convincing evidence of the crime in the mutilation that was afterward committed.

Now, then, it has been remarked before you that this

is a new kind of a case, as if the like had never been heard of before. Conspiracy is not a new kind of crime, and I do not suppose when counsel spoke of this case as being a new kind of case that they meant to intimate that a conspiracy was a thing novel to the law; but it was meant, I take it, to indicate that a prosecution for conspiracy to do this kind of a thing was new, as if there were no precedent for it. That is a mistake, gentlemen, as I will more fully explain after awhile. This kind of a charge, almost identically, has been made before, prosecuted to the conviction of a defendant, his case appealed to the Supreme Court of the United States, or taken to that court, and the rightfulness of the procedure and the jurisdiction of the court in such cases fully affirmed. Other cases are found in the reports of the procedures of district courts that have not gone to the Supreme Court; but that you may fully understand that the law of this case is not settled only by this court, but has been settled by higher authority, I will say to you that one of the justices of the Supreme Court of the United States has had under consideration this identical case; that is, the first indictment that was returned in this case, and so far as the question of jurisdition and the right of the court to take cognizance of the case, the questions were identical with what they are now, and the same facts embraced in the indictment as now, but in a little different form, that is, embraced in several counts instead of a single count, as in the present indictment. Justice Harlan, of the Supreme Court, came into the case in this way: Mr. Coy, being one of the defendants, in order to get this question before the circuit court—we sit here in the district court, from which there is a right of appeal to the circuit court—was surrendered by his bail and went to jail, and then applied to the circuit court for a writ of habeas corpus, setting out that in substance he was unlawfully detained in prison, and giving the reasons why, setting forth these proceedings, and claiming that they were had without jurisdiction; that this court had

no right to be prosecuting or entertaining this kind of a case. Justice Harlan, of the Supreme Bench, heard that application, and rendered the decision from which I will read some extracts to you. After setting out the statutory provisions to which I have referred you and the indictment which was before him, and also the Indiana statute pertinent to the subject, the judge, among other things, said:

[Here Judge Woods read from the decision of Justice Harlan, delivered in this city in the habeas corpus case last summer, extracts fully sustaining the jurisdiction of the Federal courts in such cases, and the interpretation put by Judge Woods upon the enactments of Congress and the statutes of the State referred to, and referring, among others, to the case of *Ex parte* Clarke, 100 United States Reports, after reading which, Judge Woods proceeded:]

This case, *Ex parte* Clarke, is the one to which I referred a while ago as the case involving the legal principles involved here that had been tried before and carried to the Supreme Court of the United States. That case arose in Cincinnati, a dozen or more years ago, and the facts substantially about it were that one of the inspectors permitted his sealed bag to be taken out of his custody and off to the Seybolt Exchange, or some block in Cincinnati, and there the tally-sheets were altered in respect to local offices, just as was done in this case. The inspector, Clarke, had nothing to do with the alterations himself, except the surrender of his bags; he was careful not to know what was done with them; and for that offense he was indicted and found guilty, adjudged to suffer the penalty of the law, and the case taken to the Supreme Court of the United States. That was not a conspiracy case; it was against the inspector, but it involved the interpretation of these laws, and the jurisdiction of the courts of the United States to enforce these laws; and it is perfectly plain and clear, as Justice Harlan has de-

cided, that if the inspector is wrong in surrendering his papers, and punishable, as Clarke was held to be, so are all who conspire to induce him to violate his duty by surrendering his paper, and that is the particular charge that we have in this instance.

Now, then, it is upon that charge that you are called to investigate the evidence and determine whether these defendants are guilty or not guilty. These defendants, as in the case of every one arraigned for a criminal offense, are presumed to be innocent until they are proven guilty. That presumption goes with them until it is overcome and blotted out by the evidence; and you are not permitted to find them guilty—it is not permitted in any case to find one accused of crime guilty—until the evidence establishes his guilt beyond a reasonable doubt. Now, as a rule, on that subject of reasonable doubt, I am not accustomed to enlarge or go into definitions. Men of the experience of those called to act as jurors in this court may ordinarily be trusted to determine for themselves what is a reasonable doubt; but much emphasis has been laid upon that question in the argument before you, and it becomes proper that I should instruct you more particularly. The definition of "reasonable doubt," as presented by counsel for defendants, was not strictly accurate. He introduced into it one element that does not belong to it. That definition, the one he had reference to, had its origin in this State, I believe, in the case of Bradley *vs.* The State, decided by the supreme court of this State, where it is stated there that there must be such a certainty as would justify to the mind action not only in matters of importance but in those of the highest import involving dearest interests.

Counsel added, with repeated emphasis, that the evidence must be of such certainty that the juror could instantly act upon it in matters of this kind. There are no conditions or circumstances upon which a juror is called to make up his mind instantly about any question. The whole idea of having the jury in the box is that they

shall carefully, dispassionately, and calmly deliberate, and from a calm and complete survey of the whole field of testimony—not instantly or hastily, but deliberately—make up their minds upon the question of guilt or innocence. However, in this same case there is a better definition, in my judgment, and, indeed, I think the supreme court of Indiana, in a later decision, has itself approved of a better definition of that certainty which ought to prevail in the mind of the jury in order to meet this requirement, that conviction shall be reached without reasonable doubt. It is not a mathematical certainty that jurors are required to come to. If that were so, criminals would go unpunished, of course, because I reckon it seldom if ever happens that any one is arraigned and convicted upon evidence which might not be put in doubt by conjecture and by throwing into the case suggestions which were sought from abroad and not found in the evidence. When men plead guilty there is no absolute mathematical certainty that they are guilty; it is often done for a purpose. Moral certainty is what the jury is required to reach before they convict, and moral certainty, as defined by a law-writer, approved by the supreme court of Indiana in the volume which I hold in my hand, is "an impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it, the conclusion presented being one which can not, morally speaking, be avoided consistently with adherence to truth." When the evidence so convinces your mind of the charge that you are coerced, morally coerced, to believing it, and feel that you can not consistently, with honesty, and honest thinking, and honest reasoning, reach a different conclusion, then there is that moral certainty upon which you are not only permitted but, if the evidence establishes it, required by the law of the land to determine the guilt of the accused; but if the evidence falls short of that the defendants are entitled to the benefit of it, and should go acquit.

It is proper that I should give you some more explicit instructions in reference to conspiracy. It is sometimes thought, perhaps, that there is something mysterious about the word "conspiracy." It is not so. It simply means concurrent action, agreed action, men acting together upon a common understanding to accomplish an unlawful purpose. As I expressed myself to a former jury in this case, a conspiracy is simply an agreement, a combination between two or more persons to do an unlawful thing or to do a lawful act in an unlawful way. It is not necessary that there should have been any formal agreement between the parties to do the acts charged. It is sufficient if the minds of the parties understandingly met in an intelligent and deliberate intention to do the acts, commit the crime charged, although such agreement was not manifested by any formal words.

The supreme court of this State has aptly expressed the definition in these words, in a recent decision: "Concurrence of sentiment and co-operative conduct in an unlawful enterprise, and not formality of speech, are the essential ingredients in a criminal conspiracy." Where it appears that parties are acting under such agreement, or conspiracy, then of course each is responsible for the acts of the other; consequently, it is unnecessary after the conspiracy is proved to prove that each member of the conspiracy has had anything to do with the accomplishment of it, because after the conspiracy is formed each is then responsible for what any member of it does.

It is necessary as against each defendant, in order to convict him, that it shall be shown that he was a member of the conspiracy, and until that fact is shown the acts of the other conspirators are not to be deemed binding on him. He can be bound only by his own acts until by his own acts or words he has connected himself with the conspiracy. Once he has connected himself with the conspiracy he becomes responsible for the acts of the others in the conspiracy while it is pending and its purpose unaccom-

plished. Of course, after the purposes of the conspiracy have been accomplished, the others are no longer his agents to talk or act for him, and can not bind him by their talk or conduct. That might be illustrated in this case by the item of testimony introduced here against Mr. Spaan. Just after I charged the jury on the former trial, at the base-ball grounds, he made some remark about Mr. Reardon, that Reardon knew more about these things than any of the rest of them, or something to that effect. Now, that testimony, if Mr. Reardon were on trial, as in a sense he is on trial, is not to be considered against him at all, because it was a statement made by Mr. Spaan after the conspiracy was ended, and its objects fully accomplished or thwarted, as the facts may be; but as against the man who makes the statement, of course it tends to show a guilty knowledge on his part, even though it be a statement about another man whom it does not bind, as I instruct you it does not bind Mr. Reardon and should not be treated as tending to establish guilt on his part.

While the execution of the conspiracy is pending, and after it is shown that any one of the accused has become a member of the conspiracy, the acts or talk of others in the course of execution of the scheme are binding upon him, that is, evidence against him; and indeed one who becomes a member of a conspiracy after its first formation knowing of its existence, binds himself not only by what had been done before he enters into the conspiracy, but by what shall be done until the scheme is executed or abandoned.

Now it is not necessary, as plainly enough indicated perhaps already, that every defendant or every party found guilty or to be found guilty should have been in the conspiracy at its beginning. If he comes into it after others have formed it and are working it out, and lends his help, he becomes guilty with the rest. He may not even know who the original conspirators were, but if such knowledge comes to him as to show him that there is a scheme which

involves a conspiracy, and he lends his aid to it, even though he knew nothing about its formation or beginning, but lends his aid to it under circumstances that convince the jury that he must have known what had been going on—must have known that the scheme was one of conspiracy—then he becomes guilty, even though he did not actually know who his associates were in the scheme. If he knows the scheme and that it is a conspiracy from its nature and lends his help to it, he becomes a party to it.

There is a matter that comes into my mind now, and I will dispose of what I have to say about it without much regard to order. Something was said about a committee of one hundred. That is not an issue before us at all. You have had no opportunity to know what the committee of one hundred is or who they are. The mere fact you do know that there is a committee of one hundred in this city, organized by reason, perhaps, of these occurrences—without doubt for the purpose of ferreting out these crimes. They have employed attorneys, and the work of their attorney has, to some measure, been revealed to you. As long ago as 1866 there went into effect a statute enacted by the legislature of this State which provided that ten or more citizens of the State might form themselves into a company or corporation "for the purpose of detecting and apprehending horse-thieves and other felons, and may expend such moneys"—I quote from the statute—"as may be deemed necessary in the pursuit and arrest and in procuring the conviction of felons, and do all other acts and things consistent with the object of this act and of such association." Thus you see it is recognized by law as a proper thing for men to do to form themselves even into a corporation for the purpose of detecting and punishing criminals.

It is no ground for reproach against any association of citizens that they have organized for the purpose of detecting crimes like this which your are called to investigate. If they do any wrong, of course, the jury will be

careful not to help consummate it; but, until they do something unfair and unjust to the defendants on trial, the defendants on trial and their attorneys have no right to complain of citizens for acting thus. For, if not according to the very letter, it is according to the spirit of an express statute of the State. It is not to be tolerated in this country that every man arraigned for crimes shall arraign everybody that may be concerned in bringing him to the bar of justice. When a man is brought to the bar of justice the law throws about him every shield in the way of a presumption of innocence and the rules with regard to reasonable doubts, to guard him against an unjust verdict. But it is the duty—it is at least the right of citizens and the duty of courts and public officers, when proper reason is shown for it, to bring men to the bar of justice and produce the evidence against them, and if it be enough to convict, then convict; and if it falls short then unhesitatingly acquit and let them go. It is not our duty—it is not beneficial to the course of the administration of justice that every man who happens to have something to do with the administration of the law and bringing accused ones before the bar of the court shall be subject to abuse and aspersion on that account. But I say if any wrong is done, if any party brought within your view is shown to have used any unjust means as against any of the accused, then that is, of course, proper matter for you to consider, and I wish that nothing I have said to withdraw your mind from any just consideration of that kind.

DECISION OF JUDGE HARLAN IN RE COY.

HARLAN, Justice. The petitioner, Coy, is in custody under process based upon two indictments in the district court of the United States for the district of Indiana.

He claims that that with which he is charged, if crimes at all, are crimes against the State, and not against the United States; consequently, that the district court is without jurisdiction to proceed against him. If this contention be sound, the prisoner is entitled to be discharged (*Ex parte Lange*, 18 Wall., 163; *Ex parte Rowland*, 104 U. S. R., 604; *Ex parte Fisk*, 113 U. S. R., 718; 5 Sup. Ct. Rep., 724), otherwise he must be remanded to the custody of the proper officer to be tried for the offenses charged.

One of the indictments is under section 5440, Revised Statutes, which provides that "if two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court." (21 Stat. L., 4; Supp. Rev. Stat., 484.) The first count of that indictment charges that Samuel E. Perkins, Simeon Coy, Henry Spaan, John H. Councilman, Charles N. Metcalf, John E. Sullivan, Albert T. Beck, George W. Budd, Stephen Mattler, William F. A. Bernhamer, and John L. Reardon did "conspire, confederate, and agree together, between and among themselves, to commit an offense against the United States, and did then and there, unlawfully, knowingly, and feloniously, then and there conspire, combine, confederate, and agree together, between and among themselves, to induce, aid, counsel, procure, and advise one Allen Hisey to unlawfully neglect and omit to perform a duty required and imposed by the laws of the State of Indiana relating to and affecting a certain election had and held at and in the county of Marion, in the State and district of Indiana, and at the second precinct of the thirteenth ward of the city of Indianapolis, in the county of Marion aforesaid, on the 2d day of November, A. D. 1886,

pursuant to law, at which election a Representative in Congress for the Seventh Congressional district of Indiana was voted for, to wit: To unlawfully neglect and omit to safely keep in his possession and custody the tally papers, poll lists, and certificates of said election at said precinct; he, the said Allen Hisey, being then and there an officer of said election, to wit, an inspector of said election at the second precinct of the thirteenth ward of the city of Indianapolis aforesaid, having been thereto duly appointed, and having duly qualified under the laws of the State of Indiana, and acting as such inspector; and that, to effect the object of said conspiracy, the said Samuel E. Perkins then and there, after one of the tally papers and one of the poll lists of said election at said precinct, and the certificate of the number of votes each person had received at said election at said precinct, designating the office, signed by the board of judges of said election at said precinct, had been deposited with him, the said Allen Hisey, as inspector as aforesaid, and that after he, the said Allen Hisey, had received the said tally paper, poll list, and certificate aforesaid, for the purpose of returning the same to the board of canvassers of said election for the county of Marion aforesaid, he, the said Samuel E. Perkins, did then and there, by unlawfully and feloniously counseling and advising him, the said Allen Hisey, so to do, and by other unlawful means, to the grand jurors aforesaid unknown, unlawfully used to effect the same unlawful purpose, unlawfully induced and procured him, the said Allen Hisey, to unlawfully omit and neglect to safely keep said tally paper, poll list, and certificate in the possession and custody of him, the said Allen Hisey, as inspector as aforesaid, and by said unlawful means induced and procured said Allen Hisey, as inspector as aforesaid, to surrender and deliver to and into the possession of the said Samuel E. Perkins, and permit him, the said Samuel E. Perkins, to take and have the possession and custody of said tally paper, poll list, and certificate, and the said tally paper to then and

there unlawfully mutilate, alter, forge, and change, before the said tally paper, poll list, and certificate had been returned to and canvassed and estimated by the board of canvassers of the said election of the county of Marion aforesaid, he, the said Samuel E. Perkins, not being then and there an officer of said election, and not then and there being a person authorized by the laws of the State of Indiana to have possession and custody of said tally paper, poll list, and certificate aforesaid, contrary to the form of the statute of the United States, and against the peace and dignity of the United States of America." The second count charges the defendants with having committed a like offense in respect to the same election in the second precinct of the twenty-third ward of Indianapolis; and the third count charges them with having committed a like offense in respect to the election in the second precinct of the tenth ward.

The other indictment is against Coy alone. It charges him with having unlawfully and feloniously advised, induced, and procured the inspector at said election in the third precinct of the thirteenth ward—with whom was deposited the poll list, tally paper, and certificate of the election—to neglect and omit the performance of the duty, imposed by law, of safely keeping said documents in his possession until delivered to the board of canvassers, and to surrender them to Perkins, by whom they were altered and mutilated.

Under what circumstances is the failure, neglect, or refusal of an officer of an election, at which a Representative in Congress is voted for, to perform a duty imposed upon him, as such officer, by the law of the State, an offense against the United States?

By section 5511, Revised Statutes, it is provided that "if, at any election for Representative or Delegate in Congress, any person * * * interferes in any manner with any officer of such election in the discharge of his duties; or by any such means, or other unlawful means,

induces any officer of an election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty or any law regulating the same; * * * or aids, counsels, procures, or advises any such * * * officer to do any act hereby made a crime, or omit to do any duty the omission of which is hereby made a crime, or attempt to do so, he shall be punished," etc.

That the persons mentioned in the various counts of the indictment for conspiracy as inspectors of election were lawfully in the discharge of the functions appertaining to that position is conceded in argument, and is aptly alleged in the indictment. It is also conceded, and, if it were not, it is clear, from the statutes of the State, to be hereafter examined, that they were under a duty to give or make a certificate, document, or evidence in relation to the election in their respective precincts. Each inspector, at such election, who violated or refused to comply with his duty, or any law regulating the same, as well as every one who aided, counseled, procured, or advised him to violate, refuse, or omit to perform his duty, were, according to the express words of this section, guilty of a crime. It is equally clear, in the other case, that the petitioner, Coy, committed a crime if he aided, counseled, procured, or advised an inspector at such election to violate or to refuse or omit to comply with his duty or any law regulating the same.

By section 5515 it is provided: "Every officer of an election at which any Representative or Delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or territory thereof; or who violates any duty so imposed;

or who knowingly does any acts thereby unauthorized, with intent to affect any such election or the result thereof; * * * shall be punished as prescribed in section 5511." (Supp. Rev. Stat., 142.)

Observe, "intent" is not made an element in determining the existence of the offenses specified in that section, except in those cases where the offender knowingly does an act "unauthorized" by the law of the United States, or by the law of the State or Territory under whose sanction he exercises the functions of an officer of election. His neglect or refusal to perform a *duty* required by law in regard to an election, *at which a Representative of Congress is voted for*, is made by this section an offense against the United States, although such non-performance of duty is without an evil intent; while the doing of an act simply "unauthorized" by law is not punishable unless done with an intent to affect the election or the result thereof. Whether that distinction is justified by sound public policy was for the law-making department of the Government to determine. It was well said by the court, commenting on section 5515, in *United States* v. *Jackson*, (25 Fed. Rep., 550):

"Congress seeks by this statute to guard the election of members of Congress against any possible unfairness, by compelling, under its pains and penalties, every one concerned in holding the election to a strict and scrupulous observance of every duty devolved upon him while so engaged. * * * The evil intent consists in disobedience to the law. The legislature has the power to adjudge, and does adjudge, that the doing of the thing is not for the public good; and whether its judgment be wise or unwise, it is always binding on the citizen, and the doing of it is a crime. This is particularly so with reference to that class of statutes imposing duties on public officials in the exercise of their public functions. The command of the legislative will must be obeyed, and disobedience is a crime, and may be punished as such."

I proceed to inquire whether the alleged surrender of the certificate, tally paper, and poll list was a violation of any *duty* imposed upon the inspector as an officer of the election at which a Representative in Congress was voted for. If it was, it follows, in view of the plain words of the statute, that he committed an offense against the United States; consequently, those who conspired to induce or procure, and any one who advised, counseled, induced, or procured him to neglect or violate his duty by surrendering the election papers to Perkins also committed an offense against the United States.

The duties imposed by the laws of the State upon inspectors at an election at which a Representative in Congress is voted for are set forth in chapter 56 of the Revised Statutes of the State of 1881.

Township trustees by virtue of their office are inspectors of election in the precincts in which they reside. Prior to the opening of the polls they appoint two judges of different political parties, who, with the inspector, constitute a board of election. (Rev. Stat. Ind., § 4688.) The judges and the inspector, before the election is opened, are required to take an oath to support the Constitution of the United States and of the State, and to faithfully and impartially discharge the duties assigned by law. (*Id.*, § 4692.) The inspector is the chairman of the board of election. (*Id.*, § 4695.) When the polls are closed it is made the duty of himself and the election judges to open the ballot-box and count the votes, the ballots to be taken out one by one by the inspector, "who shall open them as he takes them out, and read aloud the name of each person printed or written thereon, and the office for which every such person is voted. He shall then hand the ballot to one of the judges, who shall examine the same and hand it to the other judge, who shall string it on a thread of twine." (*Id.*, § 4710.) No person can be admitted to the room where the counting is done, except the members of the board of election, the sworn clerks, and two voters from each

political party having candidates to be voted for. (*Id.*, § 4711.)

Other sections of the statutes of Indiana are as follows:

"SEC. 4712. When the votes shall be counted the board of judges shall make out a certificate under their hands, stating the number of votes each person has received, and designating the office, which number shall be written in words; and such certificate, together with one of the lists of voters and one of the tally papers, shall be deposited with the inspector, or with one of the judges selected by the board of judges.

"SEC. 4713. As soon as the votes are counted, and before the certificate of the judges as prescribed in the foregoing section is made out, the ballots, with one of the lists of voters and one of the tally papers, shall, in the presence of the judges and clerks, be carefully and securely placed by the inspector, in the presence of the judges, in a strong and stout paper envelope or bag, which shall then be tightly closed and well sealed with wax by the inspector, and shall be delivered by such inspector to the county clerk at the very earliest possible period before or on the Thursday next succeeding said election; and the inspector shall securely keep said envelope containing the ballots and papers therein, and permit no one to open said envelope, or touch or tamper with said ballots or papers therein. And upon the delivery of such envelope to the clerk, said inspector shall take and subscribe an oath before said clerk, that he has securely kept said envelope, and the ballots and papers therein, and that, after said envelope had been closed and sealed by him in the presence of the judges and clerks, he had not suffered or permitted any person to break the seal or open said envelope, or touch or tamper with said ballot or papers, and that no person has broken such seal or opened said envelope to his knowledge, which oath shall be filed in said clerk's office with the other election papers.

"SEC. 4714. The clerk shall securely keep said envelope

so sealed, with the ballots and papers therein, in the same condition as it was received by him from the inspector in his office (unless opened by said inspector, in the presence of the board of canvassers, as herein provided), for the period of six months. But, when such election is contested he shall preserve them so long as such contest is undetermined, subject to the order of the court trying such contest. * * *

"SEC. 4715. The inspectors of each township or precinct, or the judges of election to whom the certificates, poll-books, and tally papers shall have been delivered as provided for in this act, shall constitute a board of canvassers, who shall canvass and estimate the certificates, poll lists, and tally papers returned by each member of said board, for which purpose they shall assemble at the court-house, on the Thursday next succeeding such election, between the hours of 10 a. m. and 6 o'clock p. m.

"SEC. 4716. The members of such board who shall assemble at such time and place shall select one of their number as chairman, and the clerk of the circuit court shall act as their clerk.

"SEC. 4717. Such board, when organized, shall carefully compare and examine the papers intrusted to it, and aggregate and tabulate from them the vote of the county; a statement of which shall be drawn up by the clerk, and shall contain the names of the persons voted for, the office, the number of votes given in each township and precinct to each person, the number of votes given to each in the county, and also the aggregate number of votes given, which statement shall be signed by each member of said board; which canvass sheet, together with such certificates, poll-books, and tally papers, shall be delivered to the clerk, and by him filed in his office. The same shall be preserved by him, open to the inspection of any legal voter of the county or district or State."

These statutes have been referred to at large in order to

show the great care taken by the State to guard the ballot against fraud, to secure a correct canvass of the votes cast and an honest declaration of the result. It appears that the laws of Indiana contain special provisions for the custody of two sets of papers relating to general elections: (1) The ballots, one of the lists of voters, and one of the tally papers, sealed up in a paper envelope or bag, must be delivered by the inspector into the custody of the county clerk. (2) The certificate prepared by the board of judges, showing the number of votes each candidate received, and designating the office, together with one of the lists of voters and one of the tally papers, must be "deposited with the inspector," and be returned by him to the board of canvassers, who meet on the Thursday succeeding the election for the purpose of canvassing and estimating "the certificates, poll lists, and tally papers." To the latter papers the present indictments refer. They are the papers which, it is charged, were "deposited" with the inspector by the board of election, and, after being surrendered to Perkins, were forged, altered, and mutilated.

It will be observed that the local statute does not, in express terms, require the inspector to keep those papers in his actual manual custody, during the whole period intervening after they are "deposited" with him, and before he returns them to the board of canvassers. It is therefore contended that the surrender of them to Perkins was not a violation of any *duty* imposed upon the inspector, and could not be deemed a crime unless done with the intent to affect in some way the result of the election for Representative in Congress; and that, as it is not charged in the indictment that the alleged surrender of the election papers was with such intent, or that the alleged forgeries and alterations in fact affected the result of the election for Representative in Congress, it does not appear that any offense against the United States was committed.

In support of these positions, counsel for the prisoner invoke the familiar rule that penal statutes are to be con-

strued strictly; that is, for the benefit of him against whom the penalty is inflicted. (Dwar. St., 634.) It is doubtful whether that rule has any application in the present case; for the statutes of Indiana, to which we have referred, merely regulate the conduct of general elections in that State, and define the duties of the officers of such elections. Let it, however, be conceded, for the purposes of this case, that, in determining whether the prisoner has committed a crime, the statutes of Indiana and the statutes of the United States relating to the election of Representatives in Congress, taken as a whole, should be interpreted as penal statutes strictly, and not as remedial enactments to be liberally construed in order to suppress the frauds and public wrongs against which they are directed. (*Taylor* v. *United States*, 3 How., 210; *United States* v. *Hartwell*, 6 Wall., 385.) Still the inquiry remains as to the intent with which the legislative department enacted these laws. In giving effect to the rule that penal statutes must be strictly construed, the court must not disregard the kindred rule, that the intention of the law-maker, to be gathered from the words employed, governs in the construction of all statutes. It was said by the Supreme Court of the United States, speaking by Chief Justice Marshall in *United States* v. *Wiltberger* (5 Wheat., 76–95), that, "though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation or in that sense in which the legislature had obviously used them, would comprehend." So, in *United States* v. *Morris* (14 Pet., 464, 475), Chief Justice Taney, speaking for the court, said: "In expounding a penal statute the court certainly will not extend it beyond the plain meaning of its words, for it has been long and well settled that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a

forced and overstrict construction." (See also *American Fur Company* v. *United States*, 2 Pet., 358, 367.)

Giving to the prisoner the full benefit of the rule of interpretation invoked in his behalf—leaning to the side of mercy where the liberty of the citizen is involved—I entertain no doubt that the statutes of Indiana, fairly construed, impose upon an inspector who receives the certificate, tally sheet, and poll list of a general election the duty of safely keeping them in his own custody until they are delivered or returned to the board of canvassers. The requirement that they shall be "deposited" with him, and that the board of canvassers, of which he is *ex officio* a member, shall "canvass and estimate the certificates, poll lists, and tally papers *returned by each member of said board*," is inconsistent with the idea that he may, prior to the assembling of the board of canvassers, voluntarily surrender these important papers into the hands of others. I say important papers because upon examining the statutes and the decisions of the supreme court of Indiana, it will be found that although in contested election cases the ballots, lists of voters, and tally papers, sealed up and delivered to the county clerk, are primary and conclusive evidence of the result of the election (*Reynolds* v. *State*, 61 Ind., 392, 422, *et seq.*), the papers "deposited" with the inspector constitute the basis upon which rests the official declaration in the first instance of the result of all elections in the State. (*Moore* v. *Kessler*, 59 Ind., 152.) The election of members of the State legislature, governor, Representatives in Congress, and electors for President and Vice-President all rest upon the papers so deposited with inspectors. (Rev. Stat. Ind., §§ 4717, 4718, 4721, 4723, 4724, 4726–4729.) It is inconceivable that any inspector could suppose it to be consistent with his duty to part with these papers in advance of his meeting his colleagues of the board of canvassers. They are deposited with him as an officer of the law, acting under the sanction of an oath. The word "deposited" implies that the depositary

must safely keep these papers in his own custody until he surrenders them to the board whose duty it is to canvass the returns and certify the result of the election. While he may not be responsible for their absolute safety in every case, he is under a solemn duty to guard them with diligence, proportioned to their value, and to the danger that might come to the public from their loss or mutilation. He holds them in trust for the public, and his duty to retain them in his own exclusive custody is quite as clearly defined as if the statute had so declared in express words. If he voluntarily parts with them before they are returned to the board of canvassers they are no longer "deposited" with him. Any other construction would defeat the obvious intention of the legislature and shock the common sense of every one interpreting these statutory provisions in the light of the ordinary meaning of the words used.

It is said that the inspector would not violate his duty by depositing these papers after they were received by him in some bank for safe-keeping; consequently it is contended he need not always have them in his actual manual custody. This might depend upon the mode of the deposit. If they were placed in a box in the bank vault and he alone had access to that box, they might in such a case be regarded as in his actual custody. Other cases might be supposed in which his duty to hold the papers might not be violated by the particular mode adopted for their preservation. But no case of doubtful character is now before us. The specific charge in the indictment is that the inspector unlawfully surrendered the papers to Perkins, who had no right under the law to their custody, and that he was induced to do so by Coy in one case, and in the other case by Coy and his confederates.

It was also said in argument that the indictments do not state that the crimes charged were committed in relation to or at an election for Representative in Congress. Counsel overlook the fact that in one case the accused are

charged with a conspiracy to procure and induce, and in the other case that Coy procured and induced, the inspector to unlawfully neglect and omit to perform a duty required by the laws of the State "relating to and affecting a certain election *had and held* * * * on the 2d day of November, 1886, *pursuant to law, at which election* a Representative in Congress for the Seventh Congressional district of Indiana was voted for," etc. I know judicially that such an election was authorized by law to be held, and I must take judicial knowledge of what every one knows, that such an election was in fact held at the time and place specified in the indictment. The general averment that the election was held on the day fixed by statute and "pursuant to law" is sufficient to show that it was one at which a Representative in Congress could be legally voted for.

But it is earnestly insisted that the certificate made by the board of election showing the number of votes received by each person and "designating the office," is to be deemed a separate document in respect to each candidate voted for, or at least that it was one document so far as it related to candidates for State offices and a different document or paper so far as it related to the election held for Representative in Congress; and that, in the absence of a specific averment in the indictment showing the surrender of the documents in question to Perkins to have been procured in one case by the prisoner and in the other case by him and his co-defendants, with direct reference to the vote for Representative in Congress, the district court must be held to be without jurisdiction to proceed; in other words, that the mere surrender by the inspector to Perkins of the certificate and other documents deposited with him, nothing else appearing, is not, and could not legally be made, an offense against the United States.

In these views I do not concur. It was conceded in argument, and it may be inferred from the statutes, that

the certificate in question was in fact one paper, in that it stated the result of the election as to each candidate. So, also, as to the copy of the tally paper and poll list placed in the hands of the inspector. They were none the less documents in regard to an election for Representative in Congress because they also showed the number of votes cast at the same polls for State officers. And we have seen that the inspector was under a duty imposed by law to keep them in his custody until returned to the board of canvassers, and that, by Revised Statutes of the United States, the inspector at an election at which a Representative in Congress is voted for is guilty of a crime against the United States if he neglects or refuses to perform, or violates *any duty* imposed upon or required of him "in regard to such election" by any law of the United States or of the State in which such election is held. It is not difficult to understand the reasons which induced the State to require the certificate and one copy each of the poll list and tally paper to be deposited with and safely kept by the inspector until returned by him to the board of canvassers. If mutilated or changed before they reach that board, their value as legal evidence in regard to the election both for State and national officers might be impaired or destroyed. If skillfully altered by bad men, the will of the people as expressed at the polls might be defeated. Common prudence, therefore, suggested the necessity of guarding against every possibility of such mutilation or alteration. To that end these papers were required to be "deposited" with the inspector as soon as the vote was counted by the judges of the election. In holding them prior to their being returned to the board of canvassers, that officer represented both the State and the United States. The national and State governments were alike interested in the faithful discharge of his duty as a public depositary. The documents intrusted to him in that capacity may be said to have been the joint property of the two governments. To part with them was a violation of his duty to the State,

and therefore a crime against the United States, because they related to an election for Representative in Congress, and because his neglect or refusal to perform, or his violation of, a duty imposed upon him by law "in regard to such election" is made by the express words of the act of Congress an offense against the United States, punishable by fine or imprisonment, or both. In order to obtain an honest canvass of the votes cast at an election for Representative in Congress, that which the State makes the inspector's duty to her, in respect to documents relating to the election, is made by the act of Congress a duty to the United States. It is consequently not necessary to set out in the indictment the precise nature of the alterations made by Perkins, nor aver that they were designed to affect, or in fact affected, the result of the election for Representative in Congress. As the papers in question related to the election for Representative in Congress—although containing evidence as to the election for State officers—the mere surrender of them to Perkins by the inspector, in violation of the duty imposed upon him by law, constituted an offense against the United States, without reference to the nature of the alleged alterations or forgeries. The offense of the inspector was complete the moment he surrendered the papers to Perkins; and when the latter received them, the offense of the prisoner in the one case and the offense of the prisoner and his co-conspirators in the other case were also complete.

The authority of Congress to enact the statutes to which reference has been made is no longer an open question in the courts of the Union. Such legislation is authorized by that provision of the Constitution which invests Congress with power to make regulations as to the time and manner of holding elections for Representatives in Congress, or to alter such regulations as the State prescribes. (Art. 1, § 4.) The requirement that officers of elections at which such Representatives are voted for shall perform the duties imposed by the State in regard to such elections is the

same, in legal effect, as if Congress had in the first instance and by direct legislation imposed those duties upon those officers. It would be extraordinary indeed if the nation could not prescribe penalties for the non-performance of duties in regard to elections for Representatives in Congress by those exercising the functions of officers at such elections. It is immaterial that such officers were appointed by the State. When supervising elections for Representatives in Congress, they can be reached by the power of the United States and punished for neglect of the duties they assume to discharge. These views are sustained by the elaborate judgments of the Supreme Court of the United States in *Ex parte Siebold*, 100 U. S. R., 375; *Ex parte Clarke, Id.*, 399; and *Ex parte Yarbrough*, 110 U. S. R., 651; 4 Sup. Ct. Rep., 152, in which the power of Congress, either by direct legislation or by adopting the regulations established by the State to secure the integrity and freedom of elections at which Representatives in Congress are chosen, is placed upon grounds that can not be shaken. Those cases cover the whole field of argument.

I am of opinion that the district court of the United States has jurisdiction to proceed under these indictments. The application for the discharge of the prisoner must therefore be denied. It is so ordered.